Supreme Court, U.S.
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In The

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Supreme Court of the United States

MARGARET YORK, WILLIAM NASH
and VICTOR TURNER,

Petitioners,

v.

RICHARD ROBINSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a First Amendment retaliation case, is the issue of whether a public employee spoke pursuant to "official duties" under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a question of law for the court, as determined by the First, Fifth, Tenth, Eleventh, and D.C. Circuits, or a mixed question of law and fact to be first submitted to a trier of fact as determined by the Ninth and Third Circuits?

2. What criteria are to be applied in determining whether a public employee's communication occurred pursuant to "official duties" under *Garcetti*?

3. Given that the court in *Garcetti* expressly declined to provide specific criteria for determining when public employee speech is pursuant to an "official duty," are individual defendants shielded by qualified immunity for allegedly mistakenly determining that employment regulations requiring employees to report acts of discrimination, misconduct or excessive force could subject an employee to adverse employment action based upon a failure to adhere to the proper chain of command for reporting such violations?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Richard Robinson, plaintiff, appellee below, and respondent here;
- Margaret York, William Nash, and Victor Turner, defendants, appellants below, and petitioners here.

In addition, the County of Los Angeles is a defendant in the underlying action, and was a nominal appellant below, though no appellate argument was presented on its behalf.

There are no corporations involved in this proceeding.

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The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix, "App." 1-17) was filed on April 27, 2009, has not yet been assigned an official publication citation in the Federal Reporter, but can be found at 2009 WL 1109534 (9th Cir. 2009). The Ninth Circuit's order granting a stay of mandate pending disposition of a petition for writ certiorari was not reported and is found in the Appendix at page 31. The decision of the district court denying petitioners' motion for summary judgment based on qualified immunity was not reported, and is found in the Appendix at pages 32-48.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals initially filed its Memorandum disposition and judgment in this case on January 8, 2009. (App. 18.) On March 24, 2009, this Court granted petitioners' request to extend the time within which to file a petition for writ of certiorari, to and including May 26, 2009. (Application No. 08A842.) On April 27, 2009, pursuant to the request of respondent, the Ninth Circuit withdrew its prior memorandum and issued a published opinion. 28 U.S.C. section 1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion and judgment of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondent pursuant to 42 U.S.C. section 1983, which reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983.

The respondent alleges that the petitioners violated his rights under the First and Fourteenth Amendments to the United States Constitution, the relevant parts of which read as follows:

> ***First Amendment:*** Congress shall make no law respecting an establishment of religion,

or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment (Section I): All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 20, 2006, respondent Richard Robinson filed a complaint for violation of civil rights under 42 U.S.C. section 1983, naming as defendants, among others, Margaret York, William Nash, and Victor Turner.[1] (Appellants' Excerpts of Record – "AER" – Vol. 2 at 10.) The central allegation of the complaint was that Robinson, who is employed by the County of Los Angeles as a law enforcement officer in the Office

[1] Also named as defendants were the County of Los Angeles and the Los Angeles County Office of Public Safety.

of Public Safety ("OPS"), had not been promoted from sergeant to lieutenant by petitioners York, Nash, and Turner, because respondent had purportedly reported too many incidents of misconduct by fellow officers and command staff within the OPS. (2 AER 14-17.) He also asserted that he had been subjected to an internal affairs investigation for having researched and investigated possible misconduct by another employee (2 AER 17), and that this investigation was in retaliation for his having reported various acts of misconduct.

Specifically, respondent alleged the following actions that purportedly prompted retaliation by defendants:

- Respondent had testified concerning misconduct and corruption in the OPS in a lawsuit against the County of Los Angeles, and that testimony resulted in an adverse decision against the County. (2 AER 13, para. 9.)

- In March 2003, respondent reported what he believed to be corruption and misconduct by a fellow officer who may have been working for an outside employer while "on the clock" and working for OPS. (2 AER 13, para. 10.)

- In September 2003, respondent discovered various high-ranking OPS officials drinking in a private establishment while on duty and respondent immediately contacted the on-call internal

affairs officer to request a command officer to report to the location before the intoxicated personnel could leave the location. (2 AER 13, para. 11.)

- In December 2003, respondent had not been contacted or interviewed by internal affairs with respect to either the March or September 2003 incidents reported above and thus respondent forwarded an email to the officer in charge of internal affairs asking when he could expect to be contacted for an interview. (2 AER 13, para. 12.)

- In December 2003 and February 2004, respondent spoke with petitioner Nash, who was interim Chief of Police, and Chief of Staff Lamar LaFave to review the details of his prior complaints. (2 AER 14, para. 13.)

- In May 2004, Robinson reported a possible battery committed by an officer on a police explorer and requested an investigation because he felt that officers were trying to "sweep it under the rug." (2 AER 14, para. 14.)

- In October 2004, Robinson filed an official complaint with internal affairs on behalf of another officer who had been experiencing racial and ethnic discrimination and harassment. (2 AER 14, para. 14.)

- In October 2004, Robinson notified Chief of Staff Lamar LaFave about a possible use of force incident where a suspect had been detained by another OPS officer and had been knocked to the ground and suffered a large contusion on his head, but the sergeant who responded to the scene did not conduct a necessary use of force investigation nor provided medical treatment for this suspect. (2 AER 14, para. 14.)

- In January 2005, Robinson initiated a complaint against a lieutenant who had verbally abused him in front of numerous OPS employees, but despite bringing these matters to the attention of his superiors, the matters were not investigated and no corrective action was taken. (2 AER 14, para. 14.)

In the course of discovery, respondent asserted an additional claim of retaliation based on having reported to superiors that various members of the OPS training unit had tattoos associated with a rogue group of Sheriff's deputies that had a reputation for committing unlawful and racist acts. (2 AER 43; App. 35, para. 5.)

Petitioners York, Nash, and Turner moved for summary judgment. Petitioners contended that all of respondent's claimed communications, save for his trial testimony and another squarely personal matter, fell within his duties as a public safety officer and indeed were required by regulations specifically

directing employees to report incidents of discrimination, excessive force, or other misconduct. (2 AER 38-39.)[2] Citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006), petitioners argued that respondent's communication was required by the duties of his job, and hence could not form the basis of a First Amendment claim. (2 AER 37-39.) Petitioners further contended that under the two-part inquiry set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), overruled in part, *Pearson v. Callahan*, 550 U.S. ___, 129 S. Ct. 808 (2009), they were also entitled to summary judgment based on qualified immunity because respondent could not establish a First Amendment claim in the first instance, and in any event the lack of any clearly established law providing guidelines for determining

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[2] These OPS policies and regulations included a requirement that a "member shall promptly report to his immediate supervisor any information or incident coming to his attention that might indicate the need for Office of Public Safety actions." (2 AER 80, fact 77.) The "duties of all sworn personnel" were defined to "include protecting employees and property of the County of Los Angeles. . . ." (2 AER 92-93, fact 91.) OPS policy specifically stated that any "employee or prospective employee, Reserve, volunteer, or Explorer Scout with a complaint of discrimination, or any member with information of possible discrimination, should report the matter to the immediate supervisor of the person who is the subject of the allegation." (2 AER 86, fact 86.) While OPS regulations directed officers not to interfere in investigations or other matters that are the responsibility of another member or another unit of the OPS, "[s]worn personnel learning of information pertinent to such investigations will notify their Captain and report the information to the concerned member, Office of Public Safety Unit, or law enforcement agency in a timely manner." (2 AER 85-86, fact 85.)

when public employees engage in "official" as opposed to "personal" speech, defendants were shielded from liability. (2 AER 52-54.)

In opposing the motion, respondent did not dispute the existence of the OPS policies and regulations concerning the reporting of use of force, discrimination or other misconduct. Instead, Robinson simply objected that the documents "speak for themselves," were irrelevant, and "[d]isputed" in that "[p]laintiff was not hired to report internal misconduct." (4 AER 460, fact 77; 461, 467, fact 86; 469, fact 88; 470-471, fact 89.)

Respondent contended that *Garcetti* did not apply, or at the very least there was an issue of fact, because he was not specifically hired to report misconduct and he had never been subject to investigation or inquiry for purportedly having failed to properly report any allegation of purported misconduct. (4 AER 415-417.)

On August 7, 2007, the district court denied petitioners' motion for summary judgment. With respect to whether respondent's speech activities occurred when he was "acting within the course and scope of his duties" under *Garcetti*, the district court held that there was a material issue of fact. (App. 38-39.) The court held that a general policy of requiring employees to report to supervisors any information or incident coming to the attention of an officer that might indicate the need for "Officer of Public Safety actions" was too general a policy to establish a

particular duty to report misconduct. (*Ibid.*) The court further concluded that petitioners' purported complaints that respondent reported too much misconduct, created an issue of fact as to whether respondent, as a matter of official duty, was required to report the incidents of misconduct and discrimination in question. (*Ibid.*) The district court denied qualified immunity, with respect to the "clearly established law" prong of *Saucier*, finding

> the law has been clear for almost 40 years that public employees have First Amendment rights, that speaking out on matters of public concern is protected speech, and that they cannot suffer an adverse employment action for speaking out on matters of public concern so long as their conduct does not disrupt the employment relationship.

(App. 45.)

Petitioners appealed the denial of qualified immunity. On January 8, 2009, the Ninth Circuit issued a memorandum affirming the judgment. (App. 18.) Citing *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1130 (9th Cir. 2008), the court held that the question of whether respondent's reports were made in conjunction with his official job duties and hence not protected under the First Amendment under *Garcetti*, was a mixed question of fact and law, and the district court's finding of a triable issue of fact barred review under *Johnson v. Jones*, 515 U.S. 304, 319-320. (App. 19, 27.)

Upon application of respondent seeking publication of the court's opinion, on April 27, 2009, the Ninth Circuit withdrew its memorandum disposition of the case and issued a published opinion. (App. 1.) The court again declined to reach the issue of whether respondent's speech fell within his official duties under *Garcetti*, on the grounds that it was a mixed question of law and fact, and the district court had identified a factual conflict on the issue. (App. 10.)

REASONS TO GRANT THE PETITION

In *Garcetti v. Ceballos*, the court held that when public employees speak as part of their official duties, the speech is not subject to First Amendment protection. The court noted that it is only when a public employee speaks as a citizen that courts must then determine, as a matter of law, whether under *Connick v. Meyers*, 461 U.S. 138 (1983) and *Pickering v. Bd. of Ed. Of Tp. High Sch. Dist. 205*, 391 U.S. 563 (1968), the employee spoke on an issue of public concern, and if so whether the interest of the employee, as a citizen, in commenting upon matters of public concern, outweighs the interest of the state as employer in promoting the efficiency of its operations.

In so holding, the court declined to articulate specific standards for determining when an employee's speech fell within his or her official duties, noting only that the inquiry was a "practical one." 547

U.S. at 424. Three years after *Garcetti*, the federal appellate courts are explicitly divided on the most fundamental nature of the inquiry itself – whether it is a question of law for the court, or a mixed question of law and fact requiring initial submission to a trier of fact. At the same time, federal trial and appellate courts have, on ad hoc basis, applied varying and sometimes inconsistent criteria in determining precisely when an employee's speech falls within his or her official duties. The resulting uncertainty and confusion create a burden on the judicial system, public entities and public employees that demands intervention by this Court.

Here, the Ninth Circuit rejected petitioners' claim of qualified immunity, finding that under the Ninth Circuit's decision in *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121 (2008), the issue whether respondent spoke as a citizen or employee was a mixed question of law and fact, and given a purported factual conflict was not subject to review on appeal. In so holding, the Ninth Circuit acknowledged that while its ruling was consistent with the decisions of the Third and purportedly the Seventh Circuit, it was in direct conflict with the decisions of at least three other circuits – the Fifth, Tenth and D.C. Circuits – which had expressly held that the question of whether an employee spoke as a private citizen or as an employee was one of law for the courts. In fact, the Ninth Circuit understated the variance among the Circuit courts, as both the First

and Eleventh Circuits have also held that the *Garcetti* inquiry is an issue of law for the courts.

It is vital that this Court address and resolve this express conflict among the circuits. As reflected by the court's decision in *Garcetti*, lawsuits arising from public employee speech are significant both in number and in impact. Absent this Court's intervention, cases are necessarily proceeding one way or the other with fundamental reversible error. If the plaintiff's role as speaker – employee or citizen – is an issue of fact, then the First, Fifth, Tenth, Eleventh and D.C. Circuits are depriving plaintiffs of a fundamental right to a jury trial on issues of fact under the Seventh Amendment.

Conversely, if the issue is one of law for the courts – as petitioners contend here – public employers and supervisory personnel are being subjected to prolonged and unnecessary litigation of issues that should properly be determined by a court, not a jury. Indeed, as occurred in this case and in other Ninth Circuit decisions, defendants are effectively stripped of the protection of qualified immunity as trial courts defer to the finder of fact as to whether an employee spoke as part of official duties or as a citizen, and the appellate courts then decline review based on the purported factual conflicts.

The uncertainty as to the nature of the issue, i.e., factual or legal, as well as the absence of express guidance from this Court concerning the specific factors to be taken into account in making the "practical" inquiry as to the scope of an employee's duties,

directly and adversely impacts the day-to-day operations of public entities throughout the country. Public employers must know whether an employee may be disciplined for speaking, or even failing to speak, as required by a specific regulation, even though the subject of the regulation is not part of his or her everyday duties. Police officers such as respondent, may not be hired specifically to investigate employment discrimination or misconduct by fellow officers, yet by regulation be required to report such incidents under pain of discipline or adverse employment consequences in order to advance the fundamental public interest. Uncertainty hamstrings a public entity in taking basic steps to guard against invidious discrimination and such things as the "code of silence" that may plague a police department and cloak excessive force. Public entities, officials and supervisors would be hesitant to impose, let alone enforce, such important yet ancillary regulations if the price to be paid for "guessing wrong" is entanglement in litigation, or even worse, civil liability under section 1983.

I. REVIEW IS NECESSARY TO RESOLVE THE EXPLICIT CONFLICT BETWEEN THE CIRCUITS ON THE IMPORTANT AND RECURRING ISSUE OF WHETHER DETERMINATION OF "OFFICIAL" OR "JOB REQUIRED" SPEECH UNDER *GARCETTI* IS A QUESTION OF LAW FOR THE COURTS, OR A MIXED QUESTION OF LAW AND FACT REQUIRING INITIAL DETERMINATION BY A FINDER OF FACT.

A. *Garcetti* Establishes That When Public Employees Speak Not As Citizens But As Employees As Part Of Their Official Responsibilities, There Is No First Amendment Interest At Issue.

In *Garcetti v. Ceballos*, 547 U.S. 410, the court held that a deputy district attorney who had purportedly been subjected to adverse employment action because of a memorandum he had written as part of his basic job duties could not assert a claim under the First Amendment. *Id.* at 420-423. As the court observed:

> The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. [Citation.] That consideration -- the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case -- distinguishes Ceballos' case from those in which the First Amendment provides

> protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. *Id.* at 421.

As the court emphasized, "[t]o hold otherwise would be to demand permanent judicial intervention in the conduct of government operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Id.* at 423.

The court noted that because the parties did not dispute "that Ceballos wrote his disposition memo pursuant to his employment duties," it had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." 547 U.S. at 424. Instead, the court simply stated that the "proper inquiry is a practical one." *Ibid.*

As we discuss, the fundamental nature of that inquiry, i.e., whether it is a question of law or a mixed question of law and fact, is hotly disputed among the circuits and requires resolution by this Court.

B. There Is An Explicit Conflict Between The Decisions Of The Ninth And Third Circuits Holding That The *Garcetti* Inquiry Is A Mixed Question Of Fact And Law, And The Decisions Of The First, Fifth, Tenth, Eleventh And D.C. Circuits Holding That The Issue Is A Question Of Law For The Court.

1. The Ninth and Third Circuits hold that the *Garcetti* inquiry is a mixed question of fact and law, requiring that any factual conflict as to the scope of employment be first determined by a finder of fact.

In *Posey v. Lake Pend Oreille Sch. District No. 84*, 546 F.3d 1121, the Ninth Circuit reversed summary judgment against a school "security specialist" who asserted his First Amendment rights had been violated when school officials took adverse action against him after he wrote a letter to them complaining about inadequate school security. 546 F.3d at 1124. The court acknowledged that a threshold requirement in any First Amendment claim was that the employee establish that he or she engaged in constitutionally protected speech. *Ibid.* This, in turn, required a determination of whether the speech at issue touched upon a matter of public concern, and if so whether the interest of the employee, as a citizen, in commenting upon the matters of public concern, outweighed the interest of the state. 546 F.3d at 1126.

Citing *Connick*, the court acknowledged that this inquiry into the "'protected status of speech is one of law, not fact.'" *Ibid.*

The court concluded, however, that *Garcetti* had added a "third stage" to the initial determination as to whether speech was protected under the First Amendment, "requiring a determination whether the plaintiff spoke as a public employee or instead a private citizen." *Ibid.* The court noted that while in *Garcetti* there had been no dispute as to the official nature of the communication at issue, in the case before it, there was a factual dispute as to the scope of the plaintiff's duties with respect to student safety. 546 F.3d at 1127. In light of the factual dispute, the court therefore reversed summary judgment, concluding that the inquiry into the protected status of speech was no longer "one purely of law as stated in *Connick*," but rather, "*Garcetti* has transformed it into a mixed question of fact and law." *Id.* at 1127, 1129.

The Ninth Circuit has since expressly reaffirmed *Posey* in two published decisions. As noted, here the court declined to address the issue of qualified immunity based upon the purported existence of a factual dispute concerning the scope of respondent's duties. In *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009), the court similarly rejected inquiry

into qualified immunity based upon the existence of an alleged factual dispute as to the scope of duties.[3]

The *Posey* court correctly observed that its determination that the *Garcetti* issue involved a mixed question of law and fact was consistent with the Third Circuit's resolution of the issue. *See, Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007), and *Reilly v. City of Atlantic City*, 532 F.3d 216, 227 (3d Cir. 2008) ("'[W]hether a particular instance of speech is made within a particular plaintiff's job duties is a mixed question of fact and law.'").

Although the *Posey* court also asserted its decision was consistent with case law in the Seventh and Eighth Circuits, review of the cited decisions belies that characterization. The Eighth Circuit has not expressly held that the *Garcetti* inquiry involves a mixed question of fact and law. Indeed, the two Eighth Circuit cases cited by *Posey* both pre-date *Garcetti*. *See,* 546 F.3d 1128, citing *Casey v. City of Cabool*, 12 F.3d 799 (8th Cir. 1993); *Shands v. City of Kennet*, 993 F.2d 1337 (8th Cir. 1993).

Moreover, it is certainly true that the Seventh Circuit affirmed summary judgment based on

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[3] The Ninth Circuit also applied *Posey* in reversing summary judgment in favor of a public entity and various police department supervisory personnel in the unpublished decision *Densmore v. City of Maywood, et al.*, No. 07-56707 (9th Cir. 2008), 2008 WL 5077582. The court held there was an issue of fact as to the scope of a probationary officer's duties to report misconduct by fellow officers.

Garcetti in *Davis v. Cook County*, 534 F.3d 650 (7th Cir. 2008), observing that "no rational trier of fact could find" other than the plaintiff acted in accordance with her official duties. *Id.* at 653. However, in addressing the plaintiff's contention that authoring the communication at issue was not part of her official duties, the court expressly cited *Connick* and reiterated that "'[t]he inquiry into the protected status of speech is one of law, not of fact.' [Citation.] Raising a First Amendment claim, without more, does not guarantee that a jury is necessary." *Ibid.*

As we discuss, and as *Posey* acknowledged, other circuits squarely disagree with the Ninth and Third Circuits on the *Garcetti* inquiry.

2. The First, Fifth, Tenth, Eleventh and D.C. Circuits hold that the *Garcetti* inquiry is a question of law for the court.

The Ninth Circuit acknowledged in *Posey* that at least three circuits have taken an opposing view on the *Garcetti* question and expressly held that the issue of whether an employee spoke as a public employee or as a citizen is a question of law for the court. 546 F.3d at 1127-1128. The Ninth Circuit understated the conflict. The First, Fifth, Tenth, Eleventh and D.C. Circuits have all found the issue to be one of law.

In *Wilburn v. Robinson*, 480 F.3d 1140 (D.C. Cir. 2007), the court affirmed summary judgment for the

defendants in a First Amendment retaliation case, finding that the speech at issue fell within the plaintiff's job responsibilities under *Garcetti*. 480 F.3d at 1150-1151. Citing *Garcetti* and *Pickering*, the court found that the question of whether the plaintiff spoke as an employee or citizen was one of the threshold "'questions of law for the court to resolve. . . .'" *Id.* at 1149.

In *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008), the court rejected the trial court's conclusion that whether the employee's statements were made as a citizen or an employee was an issue of fact, holding instead that it was a question of law for the court:

> [W]e acknowledge that, even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question whether Charles' speech is entitled to protection is a legal conclusion properly decided at summary judgment. 522 F.3d at 513 n.17.

In *Brammer-Hoelter, et al. v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007), the court construed *Garcetti* as adding a fifth step to the "'*Pickering*' analysis of freedom of speech retaliation claims . . . " (492 F.3d at 1202) requiring a court to "determine whether the employee speaks 'pursuant to [his] official duties. . . .'" *Id.* at 1203.

Both the First and Eleventh Circuits have also recognized that the *Garcetti* inquiry is one of law for

the court. *Curran v. Cousins*, 509 F.3d 36, 45 (1st Cir. 2007) ("[I]t is the judge who decides as a matter of law the issues in the two steps *Garcetti* identifies. *See, Connick*, 461 U.S. at 148 n.7, 103 S. Ct. 1684 ('The inquiry into the protected status of speech is one of law, not fact.'); *Lewis v. City of Boston*, 321 F.3d 207, 219 (1st Cir. 2003). The court must first determine whether the speech involved is entitled to any First Amendment protection – that is, whether the speech is by an employee acting as a citizen on a matter of public concern"). *Boyce v. Andrew*, 510 F.3d 1333, 1343 (11th Cir. 2007) ("A court must . . . discern the purpose of the employee's speech."); *Battle v. Bd. of Regents for the St. of Ga.*, 468 F.3d 755, 760 (11th Cir. 2006) (per curiam) (whether the employee spoke as a citizen on a matter of public concern is a threshold legal question); *Morris v. Crow*, 117 F.3d 449, 455 (11th Cir. 1997) (per curiam). *See also*, *Burton v. City of Ormond Beach, Fla.*, 301 F.Appx. 848, 852 (11th Cir. 2008) (citing *Boyce*, *Battle* and *Morris* for the proposition that "[w]hether an employee spoke as a citizen is a question of law for the court"); *Schuster v. Henry County Ga.*, 281 F.Appx. 868, 870 (11th Cir. 2008) ("[W]hether the subject speech was made by the public employee speaking as a citizen or as part of the employee's job responsibilities is a question of law that the court decides.").

Even in the relatively short three-year time period since this Court issued *Garcetti*, the appellate courts are squarely at odds concerning the fundamental issue of whether the *Garcetti* inquiry itself

is a question of law requiring resolution by a court, or it is a mixed question of fact and law requiring initial determination by a finder of fact. This conflict necessitates review by this Court at this time.

C. It Is Essential That The Court Grant Review To Resolve The Circuit Conflict By Confirming That The *Garcetti* Inquiry Is A Question Of Law For The Courts In Order To Further The Principles Recognized In *Garcetti*, *Pickering* And *Connick* And Avoid Undermining Legitimate Claims Of Qualified Immunity.

1. Determining whether an employee's speech falls within an employee's professional responsibilities requires the same qualitative evaluation of speech content and context, as well as a balancing of public interest that courts, and only courts, perform in evaluating whether speech is subject to First Amendment protection under *Connick* and *Pickering*.

A majority of circuits have concluded that the *Garcetti* inquiry is a question of law for the court. They have done so based largely on the conclusion that *Garcetti* simply created a threshold inquiry on the general question of whether particular employee speech is subject to First Amendment protection, a question that, prior to *Garcetti*, had been clearly

established as a question of law for the court. *Connick*, 461 U.S. at 148 n.7. Both implicitly and explicitly, the circuits holding that the *Garcetti* inquiry is one of law have recognized that resolution of the issue invariably requires courts to perform the same sort of qualitative evaluation of the speech and analysis of both context and content that they do in resolving such issues as whether particular speech is of public or private concern, or whether the balancing of interests under the First Amendment favors the employee or the employer.

In *Garcetti*, the court emphasized that the inquiry into whether an employee's speech falls within the job responsibilities is a "practical" one. 547 U.S. at 424. Seizing on this, the Ninth Circuit in *Posey* declared the issue to be a mixed question of law and fact, adding its own flourish that an inquiry into the scope of employment is necessarily "*concrete* and practical." 546 F.3d at 1129, emphasis added. Even putting aside *Posey*'s questionable assumption that juries are somehow superior to courts in performing inquiries that are both "concrete and practical," the reality is that determining the scope of an employee's official responsibilities under *Garcetti* necessarily requires precisely the sort of abstract, qualitative evaluation that falls uniquely within the province of courts.

The *Garcetti* court's statement that the inquiry was necessarily a "practical one" was in direct response to the concern voiced by a dissent that public employers could use overbroad job descriptions and requirements to improperly restrict expression by

public employees. 547 U.S. at 424. It is for the same the reason that the court cautioned that over-general job descriptions would not suffice to pull otherwise unrelated expression into the ambit of job-related speech. *Ibid.*

But determining what sort of employee speech an employer may define and regulate as an official duty requires precisely the sort of First Amendment balancing and linedrawing that the court routinely performs in *Pickering* balancing. It pre-supposes that there is certain speech that a public employer cannot require as an "official duty" because it is simply too tangential, not simply to the particular day-to-day job duties performed by the employee in question, but to the basic public services we expect public entities to provide, or fundamental public interests we expect them to protect.

This case presents a perfect example in an all too common scenario. Petitioners established that there were specific Los Angeles County OPS regulations requiring the respondent to report acts of discrimination, excessive force, and other misconduct. The only factual "dispute" plaintiff raised with respect to these regulations was that he was not specifically hired to report or investigate discrimination or misconduct. According to respondent, since he was not an internal affairs division ("IAD") officer, his only job duty related to general law enforcement functions. Implicit in respondent's argument, and in the district court and Ninth Circuit's assumption that this somehow created a relevant issue of fact, is that these specific

reporting regulations, however much they may advance the public entity's interest in preventing either discrimination or excessive force, cannot be imposed on the respondent as part of his job responsibilities.

At bottom, the Ninth Circuit here is willing to let a jury decide, at least in the first instance, the question of whether respondent's job duties could properly extend beyond the specific day-to-day law enforcement function he performed. Yet, inevitably, as this Court indicated in *Garcetti*, the question of what speech an employer may require is, fundamentally, a legal inquiry. A public entity cannot, through generalized job descriptions, overly regulate employee expression, but as *Garcetti* recognized, it can surely require public employees to speak on particular matters, in a particular manner, in order to advance the interest of the public entity and the public it serves.

Plainly, regulations requiring employees to report discrimination, and police officers in particular to report incidents of excessive force, advance the public interest. Such reporting requirements may properly be imposed on public employees as part of their general duties in service of the public entity, even if the speech required by these regulations is not something a particular employee does on a day-to-day basis. In fact, these kinds of policies and procedures are precisely the sort of effective action public entities must take in order to avoid subjecting themselves to liability under *Monell v. New York City Dept. of Social*

Services, 436 U.S. 658 (1978). Nor can it be discerned how a public entity may guard against the pernicious danger of a "code of silence" with respect to excessive force by police officers without requiring officers, as part of their duties, to report acts of excessive force or other misconduct.

As the majority of circuits have concluded, the *Garcetti* inquiry necessarily overlaps the fundamental inquiry courts make in determining whether a particular speech is protected by the First Amendment under *Pickering* and *Connick*. As the Eleventh Circuit observed in *Boyce v. Andrews*, 510 F.3d 1333, 1343: "[W]e initially must decide whether . . . [the employees'] spoke as government employees or as citizens. Deciding whether a government employee's speech relates to his or her job as opposed to an issue of public concern 'must be determined by the content, form, and context of a given statement, as revealed by the whole record.'" *See also, Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007) (reviewing the context and content of employee memo in concluding that it was written pursuant to official duties); *Wesibarth v. Geauga Park Dist.*, 499 F.3d 538, 545 (6th Cir. 2007) (affirming grant of motion to dismiss under rule 12(b)(6), Federal Rules of Civil Procedure, under *Garcetti* "[t]he pursuant-to-official-duty inquiry ultimately cannot be completely divorced from the content of the speech" and "the analysis in . . . *Garcetti* suggests that the content of an employee's speech – though not determinative – will inform the

threshold inquiry of whether the speech was, in fact, made pursuant to the employee's official duties.").

Because the inquiry as to the scope of employment responsibilities is intimately tied to the same sort of analysis and evaluation of content and context of employee speech that the court performs in making a legal determination under *Connick* and *Pickering*, the court should grant review to reaffirm the legal nature of this inquiry.

2. It is necessary to grant review to confirm that the *Garcetti* inquiry is an issue of law in order to assure meaningful application of qualified immunity in the numerous cases arising from public employee speech.

Over the past three decades, this Court has repeatedly found it necessary to define the standards to be employed in carefully balancing a public employee's constitutional right to free expression, and the needs of public employers to assure the efficient performance of the public's business. *See, e.g.*, *Pickering*, 391 U.S. 563; *Connick*, 461 U.S. 138; *Garcetti*, 547 U.S. 410; *Perry v. Sindermann*, 408 U.S. 593 (1972); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979). The court's frequent intervention in this area underscores the importance of setting clear standards in the context of public entity regulation of public employee speech. The sheer amount of speech, of both public and private concern

that arises in public employment, necessarily creates an environment that will spawn conflict and resulting litigation.

By virtue of their positions, public officials and supervisory personnel are particularly exposed to potential liability arising from their regulation of public employee speech. Nonetheless, in holding that the threshold *Garcetti* inquiry is a mixed question of fact and law, the Ninth Circuit has substantially reduced, if not wholly eliminated the protections of qualified immunity for public officials and supervisors in the context of regulating employee speech.

By asserting here, as in other cases,[4] that an employee's bare statement that a particular task fell outside his or her daily responsibilities is sufficient to create an issue of fact, the Ninth Circuit has essentially foreclosed successful assertion of qualified immunity both in the district court and at the appellate level. At the trial level, a district court judge faced with a contention that a general regulation may have required reporting of discrimination or excessive force would, in the face of the employee's contention that it was not included in his day-to-day tasks, require the matter to go to the jury. And, in a one-two punch, the defendants are effectively deprived of appellate review of the district court's decision in that regard, because as the Ninth Circuit held here, it is

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[4] *See, Eng v. Cooley*, 552 F.3d 1062, 1073; *Densmore v. City of Maywood, et al.*, 2008 WL 5077582.

purportedly foreclosed from reviewing such "factual disputes" under *Johnson v. Jones*, 515 U.S. 304. *See,* App. 10; *see also, Eng v. Cooley*, 552 F.3d at 1073; *Densmore v. City of Maywood, et al.,* 2008 WL 5077582. As discussed above, however, such disputes are not really factual in nature at all, but instead involve the sort of qualitative and normative judgments that courts, and only courts, can make in resolving issues of law.

Again, while the Ninth Circuit in *Posey* asserts that even in regard to mixed questions of fact and law, a court has the final say as to whether the facts establish a claim, particularly a First Amendment claim, such belated review is too little and too late to meaningfully protect the important interests that qualified immunity was designed to advance. As this court has repeatedly emphasized, qualified immunity is a defense not simply to the underlying claim but to involvement in litigation at all, and should be raised and determined at the earliest opportunity. *Ashcroft v. Iqbal*, No. 07-1015, ___ U.S. ___, slip opinion, pp. 7-8 (U.S. May 18, 2009) ("a district-court order denying qualified immunity 'conclusively determine[s]' " that the defendant must bear the burdens of discovery; is "conceptual distinct from the merits of the plaintiff's claim' " and would prove "effectively unreviewable on appeal from a final judgment"); *Mitchell v. Forsyth*, 472 U.S. 511, 526-528 (1985); *Saucier*, 533 U.S. at 200-201.

The mischief caused by mischaracterizing a question of law as one of fact and hence insulating the qualified immunity determination from review is

underscored here. Petitioners were entitled to summary judgment based on both prongs of qualified immunity – the absence of any First Amendment violation, and, even assuming any violation, the absence of any clearly established law that would have put them on notice that respondent's speech could not constitute employee's speech under *Garcetti. Saucier*, 533 U.S. 194; *Pearson v. Callahan*, 550 U.S. ___, 129 S. Ct. 808 (2009).

For example, specific regulations requiring employees to report acts of workplace discrimination as well as other regulations requiring law enforcement personnel to report acts of excessive force, must legitimately form part of a public employee's job responsibilities under *Garcetti*, regardless of whether the employee, as here, contends that his specific job did not require him to investigate misconduct. Employees can surely be required to "speak" of such events, and be subjected to adverse action if they fail to do so, or, as contended here, fail to do so in a proper manner by going outside the chain of command.

More significantly, even if it is debatable whether such regulations are "trumped" by a plaintiff's contention that his or her day-to-day duties did not require the performance of such tasks, it cannot be said, given the state of the law, that defendants should have known that such speech could not reasonably be viewed as "employee speech." Indeed, given that the court in *Garcetti* expressly declined to provide a precise framework for making such determinations, it does violence to the very notion of

"clearly established law" under qualified immunity to conclude that defendants, pre-*Garcetti* should have somehow known what speech would fall outside an employee's job responsibilities.

Absent intervention by this Court, public officials and supervisors will be subjected to needless entanglement in litigation as both trial and appellate courts, at least within the Ninth and Third Circuits, defer to the finders of fact before even purporting to address issues that are, in reality, issues of law that should be determined promptly in the litigation. For this reason too, review is warranted.

II. REVIEW IS NECESSARY TO PROVIDE GUIDANCE ON THE FACTORS TO BE CONSIDERED IN DETERMINING WHETHER PUBLIC EMPLOYEE SPEECH FALLS WITHIN "OFFICIAL DUTIES" UNDER *GARCETTI*.

A. In The Absence Of Guidance From This Court, The Circuits Have Applied Varying, And Sometimes Inconsistent Factors In Determining Whether A Public Employee's Speech Falls Within Official Responsibilities And Hence Is Not Protected By The First Amendment.

In *Garcetti*, it was undisputed that the employee speech at issue was made in the course of the employee's official duties. 547 U.S. at 424. As a result, the court declined to provide a specific framework for

determining, in disputed cases, whether particular speech falls within an employee's official responsibilities. *Ibid.*

In the three years since *Garcetti*, the federal courts have applied varying criteria in determining whether an employee's speech has been made pursuant to the employee's job-related responsibilities. The more common factors fall within several broad categories. Yet, as we discuss, even within these categories the courts are in disagreement, giving different weight to seemingly similar factors and engaging in the sort of ad hoc decision-making that provides neither consistency nor predictability in the law.

1. The person addressed.

Several courts have held that whether the employee directed the speech to supervisors or others within the chain of command determines whether the particular communication falls with the employee's official duties. For example, in *Thomas v. City of Blanchard*, 548 F.3d 1317, 1325 (10th Cir. 2008), the court found that the plaintiff's complaints were made outside the scope of his duties, since he sent them outside his office to a state agency. Conversely, in *Haynes v. City of Circleville*, 474 F.3d at 364, the court found that the "fact that [the employee] communicated solely to his superior also indicates that he was speaking in his capacity as a public employee. . . ."

Even where an employee has unsuccessfully attempted to report misconduct up the direct chain of command and has bypassed immediate supervisors, the speech may still fall within job related duties so long as it was directed to someone within the organization. *See*, *Davis v. McKinney*, 518 F.3d 304, 313, 315-316 (5th Cir. 2008) (plaintiff complained to immediate supervisor, and after inadequate response, complained to University Chancellor: "when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job").

In contrast, here, the district court rejected petitioners' contention that respondent's various complaints of misconduct fell within his job related duties, even though it was undisputed that he directed them to officials within the OPS, albeit without complying with the specified chain of command.

2. Regulation, policy or statute requiring employee's speech.

Courts have also considered whether particular internal regulations and policies, or even statutes of state or nationwide application require an employee in the plaintiff's position to speak. In *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), a police officer claimed he was demoted in part for reporting to the district attorney his suspicions that the police chief

and deputy chief illegally harbored the deputy chief's brother, who was wanted on two felony warrants. *Id.* at 592-595. The court held that this speech was within Morales's job related duties under *Garcetti*, both because it was within his general duties as a law enforcement officer and because the police department had a specific policy requiring officers to report all potential crimes. *Id.* at 598.

In *Casey v. West Las Vegas Independent Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007), the court rejected a retaliation claim by a local school employee premised on the employee having reported misconduct to federal Head Start officials. The court held that this speech was unprotected under *Garcetti* because it was "pursuant to, or in compliance with, certain federal regulations" governing Head Start. *Id.* at 1330.

Similarly, in *Battle v. Board of Regents*, a financial aid officer alleged retaliation for speaking out about her supervisor's allegedly fraudulent handling of federal financial aid funds. 468 F.3d at 758. The court held that her speech was within the scope of her duties because, among other factors, federal Department of Education guidelines required all financial aid workers to report suspected fraud. *Id.* at 761.

In contrast, the Seventh Circuit found reporting requirements similar to those at issue in *Casey* and *Battle* to be insufficient to establish job-related requirements under *Garcetti*. In *Chaklos v. Stevens*, 560 F.3d 705, 712 (7th Cir. 2009) and *Trigillo v. Snyder*,

547 F.3d 826, 829 (7th Cir. 2008), the provision at issue was Illinois Procurement Code, 30 Ill. Comp. Stat. 500/50-40, which required state employees to report to the state's Attorney General suspicions of anticompetitive practices in procurement decisions. In both cases the Seventh Circuit held that the statute did not create responsibilities specific enough to the employee's actual job functions to make reports pursuant to the statute fall within the scope of the employee's duties for purposes of the First Amendment analysis under *Garcetti*. *See*, *Trigillo*, 547 F.3d at 829; *Chaklos*, 560 F.3d at 712.

These decisions illustrate the widely divergent approaches federal courts have taken in addressing even this single factor. They differ on such basic questions as the level of generality permissible for a statute or regulation to be deemed directed at an employee for purposes of establishing particular job duties. Is a state statute directed at a particular category of employee sufficient to create job duties? Are internal regulations directed at all of a public entity's employees on a particular issue – discrimination for example – sufficient to create a duty on all employees to report such conduct, or must regulations be directed to particular departments, job classifications or even specific employees? Current case law provides little or no guidance for predicting the outcome with any certainty in any particular case.

3. Specialized knowledge and access to information.

Several courts have held that an employee's speech is made pursuant to official duties where that speech addresses or is based on special knowledge, experience, or facts acquired in the course of performing the employee's job.

In *Williams v. Dallas Independent Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007), a high school athletic director and football coach alleged that he was improperly fired for two memos expressing concern about possible mismanagement of gate receipts and other athletic funds. *Id.* at 690-691. The court found the memos were made pursuant to the employee's official duties because the suspicions detailed in them were based upon special knowledge about the amount of funds that should have been in the school's athletic funds and standard operating procedures for athletic departments. *Id.* at 694.

The Third Circuit employed a similar analysis, in *Gorum v. Sessoms*, 561 F.3d 179, 185 (3d Cir. 2009). There, the court held that a professor's actions in advising and advocating for a student in disciplinary proceedings, fell within his professional duties. This was because the professor's position as department chair and his "special knowledge of, and experience with, the DSU disciplinary code" put him in the position of de facto advisor to DSU students facing disciplinary proceedings. *Id.* at 186.

Yet, as the present case indicates, for some federal courts the source and nature of the employee's knowledge appears irrelevant. Respondent's various complaints of misconduct were derived from his special access to, and special knowledge of, OPS facilities, regulations and procedures. Reports concerning whether other employees were engaged in on the job misconduct such as drinking while on duty, holding other jobs, using excessive force or engaging in discriminatory conduct necessarily reflect respondent's specialized, and squarely job related, expertise and access. This remains true even if respondent may have witnessed some of the misconduct while off duty, or declined to report on the job misconduct to superiors until he was off duty. Nonetheless, these factors played no part in either the district court's or Ninth Circuit's analysis of the case.

4. Employer reaction to the speech.

In denying summary judgment the district court here found a triable issue of fact as to whether respondent's duties included reporting misconduct. The court noted that Robinson testified he was told he had not been promoted because he was reporting misconduct. The court found that this was evidence that reporting such misconduct was not part of Robinson's duties, "unless one is to believe that certain duties must not be performed. . . ." (App. 39.) In its initial Memorandum affirming the judgment, the Ninth Circuit repeated the district court's statement in finding an issue of fact as to respondent's

official duties under *Garcetti*. (App. 27-28.) The Ninth Circuit, however, deleted the reference after granting the respondent's request for publication and issuing its published opinion, holding only that the existence of factual issues barred appellate review. (App. 10.)

But the approach taken by the district court here is squarely at odds with *Garcetti*. The fact that a supervisor may discipline an employee for engaging in particular speech does not mean the speech was not made in the course of official duties.

Citing *Garcetti*, the Sixth Circuit has expressly rejected the analysis employed by the district court here. In *Wesibarth v. Geauga Park Dist.*, 499 F.3d 538, the plaintiff asserted she had been fired in violation of the First Amendment for complaining about poor management to an outside consultant retained by her employer. *Id.* at 540. The Sixth Circuit affirmed dismissal of the complaint, holding that the remarks made to the consultant were in the course of plaintiff's employment duties. *Id.* at 544-545. As the court emphasized, even assuming the employer acted improperly, redress could be found only in state whistle blower statutes or labor code provisions, not in any First Amendment retaliation claim:

Although firing [plaintiff] based on her assessment of department morale and performance may seem highly illogical or unfair, the relevant question is whether the firing violated her free-speech rights

under the First Amendment. *Garcetti* informs us that it did not. *Id.* at 545.

It is difficult to reconcile the district court's reasoning here with the Sixth Circuit's analysis in *Wesibarth*. Yet such inconsistency in approach is an inevitable product of the absence of clear standards governing determination of employment duties under *Garcetti*.

B. Review Is Necessary To Provide A Framework For Determining When Employee Speech Falls Within Official Duties, In Order To Provide Public Employers And Supervisors With Guidance In Formulating, Implementing And Enforcing Policies And Regulations Concerning Employee Speech.

As noted, petitioners submit that the *Garcetti* scope of employment issue is one of law for the court. But, even if it is a mixed question of fact and law, the need for clarification and uniformity of the standards to be applied in making the determination is manifest. The varying factors considered by courts in determining whether particular speech falls within an employee's "official" duties, and even the different weight courts give to the same factors, make it difficult to predict how any particular court will resolve any given case.

The rulings of the district court and Ninth Circuit here underscore the mischief wrought by the absence of a specific framework for resolving the issue. With no clear standards courts are free to pick and choose among various criteria or even invent their own.

Thus here, the district court found it relevant that plaintiff was allegedly disciplined for performing the tasks defendants asserted were part of his duties, which it concluded undercut the contention that this was part of his duties at all. While the district court found one regulation too general to impose a duty on plaintiff to make the reports in question, it flatly ignored other highly specific regulations directly encompassing a duty to report discrimination and excessive force, as well as specific duties imposed on the plaintiff as a law enforcement officer. Yet, as discussed above, other courts have found precisely such regulations and duties not simply relevant, but conclusive in establishing job related speech.

The danger of such an ad hoc approach to resolving the *Garcetti* inquiry, goes well beyond the inability to predict the outcome in a particular case. Uncertainty in how courts view the scope of particular regulations, or general employment duties, makes it difficult, if not impossible for public entities to enact, implement and enforce regulations governing employee speech. Public employers plainly have a substantial interest in requiring employees to report workplace discrimination. However, there is no means to predict whether such reporting requirements will be

deemed to be part of an employee's duties for purpose of allowing discipline or other job related consequences based on an employee's failure to report, or improper reporting under such regulations.

Similarly, law enforcement agencies have a plain need to assure that officers do not commit acts of excessive force or other acts of misconduct. Regulations requiring officers to report such misconduct directly serve the public interest and safety. However, as this case indicates, even such specific regulations may not suffice, in the view of some courts, to create a job related duty for purposes of allowing a public employer to enact or enforce such regulations without facing the prospect of litigation.

The absence of clear guidelines from this court on this important issue directly impacts the day-to-day decision making of public employers and supervisors throughout the country. Unless and until the court provides a framework for defining "official" speech under *Garcetti*, public entities and their supervisors may hesitate to enact or enforce regulations that advance core public interests, to the detriment of the public at large.

CONCLUSION

For the foregoing reasons, petitioners urge that the petition be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD ROBINSON,

Plaintiff-Appellee,

v.

MARGARET YORK; WILLIAM NASH; VICTOR TURNER,

Defendants-Appellants.

No. 07-56312

D.C. No. CV-06-02409-GAF

ORDER AND OPINION

Appeal from the United States District Court for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted
November 20, 2008 - Pasadena, California

Filed April 27, 2009

Before: RICHARD D. CUDAHY,* HARRY PREGERSON, and MICHAEL DALY HAWKINS, Circuit Judges

Opinion by Judge Hawkins

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* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

COUNSEL

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Sanjay Bansal (presented arguments) and Michael A. McGill (authored brief), Lackie & Dammeier, Upland, California, for the plaintiff-appellee.

ORDER

Appellee's request for publication is GRANTED. The Memorandum disposition, filed January 8, 2009, is withdrawn. A published Opinion will be filed concurrently with this Order.

OPINION

HAWKINS, Circuit Judge:

Plaintiff Richard Robinson ("Robinson"), a sergeant with the Los Angeles County Office of Public Safety ("OPS"), filed a civil rights complaint under 42 U.S.C. § 1983 against the County of Los Angeles ("Los Angeles") and several OPS officers ("Defendants") alleging that he was denied promotion in violation of his First and Fourteenth Amendment rights because he reported misconduct within his department. Defendants appeal from the denial of qualified immunity. For the reasons that follow, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robinson alleges that he was not promoted because he spoke out or filed reports about misconduct in his department between 2002 and 2006. In addition to testifying in a class action lawsuit alleging discrimination by OPS, Robinson also filed misconduct reports pertaining to various problematic behavior, some of which he observed while off duty. The reports described (1) a fellow officer who allegedly worked for an outside employer while on the clock, (2) officers who appeared to be drinking alcohol during work hours, (3) OPS officers who wore distinctive tattoos possibly indicative of anti-Semitic attitudes, (4) cases of potential battery or excessive force, and (5) a "Parking for Irish Only" sign allegedly placed by OPS officers and directed at a fellow officer. After failing to receive what he considered an adequate response from OPS, Robinson took several steps following-up on these reports, including emailing internal affairs and discussing the details of the complaints with superior officers.

Robinson alleges that he participated in several conversations in which his superior officers suggested he stop filing misconduct reports. In one such conversation, a supervising officer told him that "if [Robinson] didn't bring so many issues forward . . . maybe that would help in terms of getting promoted to lieutenant."

Robinson took an examination for promotion to lieutenant in 2003. Despite placing in the highest band of candidates and receiving favorable work reviews, Robinson was not promoted before the eligibility list expired in 2006.

After failing to obtain a promotion, Robinson filed this action alleging that he had been denied promotion in retaliation for exercising his First Amendment rights. Defendants moved for summary judgment, arguing that Robinson's reports were not protected speech because they were made as part of his professional duties or because he failed to present the reports through the chain of command as required by written department policy. The district court denied the motion, finding genuine issues of material fact on the scope of Robinson's job duties and holding that a violation of a written chain of command policy was not dispositive, but merely one of the factors to be considered as part of the balancing test established in *Pickering v. Board of Education*, 391 U.S. 563, 571 (1968). The named Defendants timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

We review de novo a district court's denial of summary judgment based upon a claim of qualified immunity. *Moran v. Washington*, 147 F.3d 839, 844 (9th Cir. 1998). Although a district court's denial of qualified immunity is subject to immediate appeal as

a collateral order, our appellate jurisdiction is limited to questions of law. *Id.* at 843 (citing *Mitchell v. Forsyth,* 472 U.S. 511, 528 & n.9 (1985)) ("A public-official defendant may appeal the 'purely legal' issue 'whether the facts alleged ... support a claim of [violation of] clearly established law.'"). "Where disputed facts exist, we assume that the version of the material facts asserted by [the] Plaintiff[], as the non-moving party, is correct." *KRL v. Estate of Moore,* 512 F.3d 1184, 1189 (9th Cir. 2008). Our review is therefore limited to whether the Defendants would be entitled to qualified immunity as a matter of law assuming all factual disputes were resolved in Robinson's favor.

III. DISCUSSION

[1] Determining whether officials are owed qualified immunity involves two inquiries: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the official's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case. *Saucier v. Katz,* 533 U.S. 194, 201 (2001); *see also Pearson v. Callahan,* 129 S. Ct. 808, 818 (2009) (courts may decide which of the two prongs should be addressed first in light of the particular circumstances).

[2] In evaluating a First Amendment retaliation claim, we address "a sequential five-step series of questions." *Eng v. Cooley,* 552 F.3d 1062, 1070 (9th

Cir. 2009). First, the plaintiff bears the burden of showing: "(1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; [and] (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action."[1] *Id.* Next, if the plaintiff has satisfied the first three steps, the burden shifts to the government to show: "(4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech." *Id.* at 1070-73.

Public Concern

To warrant First Amendment protection, an employee's speech must address "a matter of legitimate public concern." *Pickering,* 391 U.S. at 571. The public concern inquiry is purely a question of law, which we review de novo. *Berry v. Dep't of Soc. Servs.,* 447 F.3d 642, 648 (9th Cir. 2006).

[3] As a matter of law, "the competency of the police force is surely a matter of great public concern." *McKinley v. City of Eloy,* 705 F.2d 1110, 1114

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[1] We need not address the third question at the summary stage because Defendants concede that there is a material factual dispute regarding whether Robinson's speech was a substantial or motivating factor in the adverse employment action.

(9th Cir. 1983). Only speech that deals with "individual personnel disputes and grievances" and that would be of "no relevance to the public's evaluation of the performance of governmental agencies" is generally not of "public concern." *Id.*

Robinson alleges Defendants retaliated against him for, among other things, testifying in a class action lawsuit that the County had engaged in systematic discrimination and harassment against OPS officers, reporting numerous instances of possible corruption, discrimination, or misconduct by fellow OPS officers, and following up on those complaints. With the exception of the three incidents identified by the district court as individual personnel disputes, each of these is clearly a "matter of public concern." *See Thomas v. City of Beaverton,* 379 F.3d 802, 809 (9th Cir. 2004) ("Unlawful conduct by a government employee or illegal activity within a government agency is a matter of public concern."); *Johnson v. Multnomah County,* 48 F.3d 420, 425 (9th Cir. 1995) (citing *Roth v. Veteran's Admin.,* 856 F.2d 1401, 1405 (9th Cir. 1988)) (The "misuse of public funds, wastefulness, and inefficiency in managing and operating government entities are matters of inherent public concern."); *see also Connick v. Myers,* 461 U.S. 138, 148 (1983) (speech merits stronger protection when employee seeks "to bring to light actual or potential wrongdoing or breach of public trust").

Defendants concede that some of Robinson's "internal reports of certain alleged misconduct involved matters of public concern," but contend that

others did not. They specifically argue that Robinson's follow-up communications pressing his reports of misconduct are not "matters of public concern," citing *Douglas v. Lexington-Fayette Urban County Gov't,* 2007 U.S. Dist. LEXIS 82818, at *18 (E.D. Ky. Nov. 7, 2007), which held that plaintiffs' complaints are not matters of public concern where they are "about the job performance of their coworkers" and "the intent of the plaintiffs [is] not to protect public safety, but rather to complain about the management's response to the situation."[2]

[4] Robinson's misconduct reports, unlike the plaintiffs' speech in *Douglas,* did not merely contain "passing references to public safety [that] were 'incidental to the message conveyed,'" *id.*, but rather related to the danger the misconduct posed and the need to respond to it. Whether OPS treats complaints of misconduct seriously or fails to followup is also a matter of "relevance to the public's evaluation of the performance of governmental agencies" and consequently independently a matter of public concern. *Coszalter v. City of Salem,* 320 F.3d 968, 973 (9th Cir. 2003). Robinson's email to the office in charge of internal affairs discussing the possibility of an interview about his prior complaints, and his conversations

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[2] Defendants also cite *Akins v. Gates,* 2007 U.S. Dist. LEXIS 68439 (N.D. Ga. Sept. 17, 2007), in support of this proposition, but the plaintiffs' speech in *Akins* was in fact held to be on matters of public concern, but was deemed unprotected only because it was included in the plaintiffs' job duties.

with superior officers reviewing the details of those complaints, clearly addressed at least two matters of public concern: the misconduct itself and the distinct question of whether the investigating officers were, as Robinson argued, sweeping misconduct under the rug.

[5] Defendants suggest that two of Robinson's misconduct reports – one regarding an officer suspected of working for an outside employer while on the clock and another alleging discrimination by one officer against another – addressed individual personnel disputes, not matters of public concern. Reports pertaining to others, even if they concern personnel matters including discriminatory conduct, can still be "protected under the public concern test." *Thomas,* 379 F.3d at 808 (explaining that an employee's speech can be protected even though it "concerned a personnel matter" because "it did not pertain to [her] own job status"); *see also Alpha Energy Savers, Inc. v. Hansen,* 381 F.3d 917, 926 (9th Cir. 2004) (holding "invidious discrimination" inherently a matter of public concern "whether it consists of a single act or a pattern of conduct"); *Cochran v. City of Los Angeles,* 222 F.3d 1195, 1201 (9th Cir. 2000) ("Although focused on one employee and not addressed directly to the public, the speech here did concern matters which are relevant to the public's evaluation of its police department.").

[6] Robinson's testimony in a class action against the County is also of public concern, regardless of whether it had an impact on the result of that

litigation. *Alpha Energy Savers,* 381 F.3d at 927 ("[A] public employee's testimony addresses a matter of public concern if it contributes in some way to the resolution of a judicial or administrative proceeding in which discrimination or other significant government misconduct is at issue – even if the speech itself would not . . . in isolation.").

Scope of Job Duties

[7] Defendants also argue that Robinson's reports were made in conjunction with his official job duties and therefore were not protected by the First Amendment under *Garcetti v. Ceballos,* 547 U.S. 410 (2006). The scope of Robinson's job duties is a question of fact. *Posey v. Lake Pend Oreille Sch. Dist. No. 84,* 546 F.3d 1121, 1130 (9th Cir. 2008). "[W]hen there are genuine and material disputes as to the scope and content of the plaintiff's job responsibilities, the court must reserve judgment . . . until after the fact-finding process." *Id.* at 1131. We lack jurisdiction to review the district court's finding of a genuine of issue of material fact regarding whether the scope of Robinson's duties included reporting police misconduct. *Johnson v. Jones,* 515 U.S. at 319-20. Instead, we assume the resolution of this dispute in the nonmoving party's favor. *Eng,* 552 F.3d at 1067.

Adequate Justification under *Pickering*

[8] Under the balancing-test mandated by *Pickering,* 391 U.S. 563, the First Amendment interests of

employees must be weighed against the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. "For us to find that the government's interest as an employer in a smoothly-running office outweighs [an employee's] first amendment right, defendants must demonstrate actual, material and substantial disruption," or "reasonable predictions of disruption" in the workplace. *Roth,* 856 F.2d at 1407; *Waters v. Churchill,* 511 U.S. 661, 673 (1994); *see also Keyser v. Sacramento City Unified Sch. Dist.,* 265 F.3d 741, 749 (9th Cir. 2001) (noting that "a showing of actual disruption will weigh more heavily"). "[T]he workplace disruption hurdle for government employers is higher in cases, like this one, where the speech involved unlawful activities rather than policy differences." *Keyser,* 265 F.3d at 749 (citing *Moran,* 147 F.3d at 849 n.6).

[9] When applying *Pickering* to an "employee's reports of 'wastefulness, mismanagement, unethical conduct, violations of regulations, and incompetence' " to his supervisors, we have held "that the public's interest in learning about illegal conduct by public officials and other matters at the core of First Amendment protection outweighs a state employer's interest in avoiding a mere potential disturbance to the workplace." *Keyser,* 265 F.3d at 747-48 (discussing *Gilbrook v. City of Westminster,* 177 F.3d 839, 867-70 (9th Cir. 1999); *Roth,* 856 F.2d at 1403-08; and *Johnson,* 48 F.3d at 425-27). In the context of "good-faith whistleblowing" involving reports within a

government department rather than to the public, "the breadth of one's audience is irrelevant" because "[i]t would be absurd to extend First Amendment protection only to those whistleblowers who immediately appear on the local news." *Hufford v. McEnaney*, 249 F.3d 1142, 1150 (9th Cir. 2001).

[10] In the Defendants' view, an exception to this clearly established law applies here because there is "no constitutional violation in requiring officers to communicate 'through channels' before enlisting public opinion to their cause." *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1039 (9th Cir. 1990). *Sanchez* limited its holding, however, to cases where the "channels" policy "is reasonable and not arbitrary." *Id.* "[E]ven in a police department, the complained-of disruption must be 'real, [and] not imagined'" and the "disruption exception cannot 'serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views.'" *Allen v. Scribner*, 812 F.2d 426, 432 (9th Cir. 1987) (citing *McKinley*, 705 F.2d at 1115); *accord Brockell v. Norton*, 732 F.2d 664, 667 (8th Cir. 1984) (courts cannot "decide in the abstract, however, that a chain-of-command policy designed to protect [a police department's] interest will always take precedence over the interest of a public employee in open communication" and "must look to the particular circumstances of each case to determine the importance of enforcing the chain of command against an employee whose speech breaches that policy").

[11] Under some factual circumstances, therefore, the *Pickering* balancing test can favor protected speech even where the speech violates the employer's written policy requiring speech to occur through specified channels. *Anderson v. Central Point School Dist.*, 746 F.2d 505, 506 (9th Cir. 1984); *see also Connick*, 461 U.S. at 153 n.14 (violation of a rule governing the circumstances when speech is permitted would strengthen a claimant's position in the *Pickering* balance, but alone would not be dispositive).

[12] Although we have sometimes found a police department's interests in discipline and *esprit de corps* to outweigh First Amendment interests, genuine factual disputes here – including, for example, the extent of potential workplace disruption and whether the justifications Defendants assert for their actions were pretextual – preclude such a determination at this stage of the litigation. *See, e.g., Cochran*, 222 F.3d at 1196 (city's interest in the proper functioning of its police department outweighed plaintiffs' expressive interests, but only after a detailed factual discussion); *Kannisto v. San Francisco*, 541 F.2d 841, 843-44 (9th Cir. 1976) (noting that "[t]he facts in this case sharply contrast with those in *Pickering*").

[13] Given the evidence that Defendants may have been more concerned with the nature and frequency of Robinson's reports of misconduct than his adherence to the formal chain of command, a fact-finder could conclude that Defendants' application of the chain of command policy was pretextual and not based on Defendants' interest in avoiding workplace

disruption. If a fact-finder did so conclude, then Robinson's speech interests would outweigh Defendants' interests under *Pickering*. Where, as here, the *Pickering* test must be applied and "there are underlying factual issues regarding the extent of office disruption," it is proper to deny a motion for summary judgment. *Roth,* 856 F.2d at 1408.

But-For Causation

Defendants may avoid liability by showing that Robinson's protected speech was not a but-for cause of the adverse employment action. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977). The *Mt. Healthy* but-for causation inquiry is, however, purely a question of fact. *Wagle v. Murray,* 560 F.2d 401, 403 (9th Cir. 1977) (per curium [sic]) ("Mt. Healthy indicates the 'trier-of-fact' should determine whether the firing would have occurred without the protected conduct.")

[14] Although Defendants are free to argue at trial that they would have taken the same adverse employment actions against Robinson regardless of his speech, Robinson has adequately alleged that the "chain of command" policy was used as a pretext and that the adverse actions against him occurred because of the content of his protected speech, not the manner in which he filed his complaints. This factual dispute cannot be resolved on summary judgment.

Clearly Established

[15] Where a "constitutional right would have been violated were [the plaintiff's] allegations established," a court must also determine whether the right was clearly established. *Saucier,* 533 U.S. 194; *see also Pearson,* 129 S. Ct. 808. "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton,* 483 U.S. 635, 639 (1987) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818-19 (1982)).

[16] The plaintiff "bears the burden of proving that the rights [he] claims were 'clearly established' at the time of the alleged violation." *Moran,* 147 F.3d at 844. The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson,* 483 U.S. at 640. "Notwithstanding this particularity requirement, 'closely analogous preexisting case law is not required to show that a right was clearly established.'" *Hufford,* 249 F.3d at 1148 (citing *White v. Lee,* 227 F.3d 1214, 1238 (9th Cir. 2000)).

[17] All of the relevant decisions defining the scope of Robinson's constitutional rights were decided well before April of 2005, when Robinson first might have been considered for promotion to lieutenant, giving Defendants adequate notice that their actions

would violate those rights. The Supreme Court had decided *Pickering*, establishing that the First Amendment protects employee speech on matters of "legitimate public concern," in 1968. *Pickering*, 391 U.S. at 571-72. It was also already clear that only a "real, not imagined, disruption" might outweigh the expressive interests of the employee, that this exception cannot serve as a "pretext," and that "employers would be required to make an even 'stronger showing' of disruption when the speech dealt . . . directly with issues of public concern." *McKinley*, 705 F.2d at 1114.

An employer's written policy requiring speech to occur through specified "channels" had been held insufficient to justify retaliation motivated by protected speech. *Anderson*, 746 F.2d at 506. "[M]isuse of public funds, wastefulness, and inefficiency in managing and operating government entities" had been held "matters of inherent public concern." *Roth*, 856 F.2d at 1405.

Therefore, at the time defendants acted in 2005 and 2006, both the constitutional protection of employee speech and a First Amendment cause of action for retaliation against protected speech were clearly established and potentially applicable to Defendants' conduct.[3]

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[3] Although the Supreme Court recently carved out an exception to this clearly established law for "expressions employees make pursuant to their professional duties" in *Garcetti*, 547 U.S. at 426, *Garcetti*, does not affect whether Defendants

(Continued on following page)

The district court's denial of summary judgment is therefore

AFFIRMED.

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are entitled to qualified immunity at this stage of the proceedings. Assuming a fact-finder resolves the factual dispute regarding Robinson's job duties in Robinson's favor, the clearly established law that existed at the time Defendants acted will apply, materially unaltered by *Garcetti*.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD ROBINSON, Plaintiff-Appellee, v. COUNTY OF LOS ANGELES; MARGARET YORK; WILLIAM NASH; VICTOR TUCKER, Defendants-Appellants.	No. 07-56312 D.C. No. CV-06-02409-GAF MEMORANDUM* (Filed Jan. 8, 2009)

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted November 20, 2008
Pasadena, California

Before: CUDAHY,** PREGERSON, and HAWKINS, Circuit Judges.

Plaintiff Richard Robinson ("Robinson"), a sergeant with the Los Angeles County Office of Public Safety ("OPS"), filed a civil rights complaint under 42 U.S.C. § 1983 against the County of Los Angeles ("Los

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

Angeles") and several OPS officers ("Defendants") alleging that he was denied promotion in violation of his First and Fourteenth Amendment rights because he made reports of misconduct within his department. Defendants moved for summary judgment, arguing that Robinson's reports were not protected speech because they were made as part of his professional duties or because he failed to present the reports through the chain of command as required by written department policy. The district court denied the motion, finding "genuine issues of material fact" on the scope of Robinson's job duties and holding that a violation of a written chain of command policy was not dispositive, but was merely one of the factors to be considered as part of the balancing test established in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968).

Although a district court's denial of summary judgment based on qualified immunity is subject to immediate appeal as a collateral order, the scope of appellate jurisdiction is limited to questions of law. *Moran v. Washington*, 147 F.3d 839, 843 (9th Cir. 1998) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 528 & n.9 (1985)) ("A public-official defendant may appeal the 'purely legal' issue 'whether the facts alleged . . . support a claim of [violation of] clearly established law.'"). A defendant may not "appeal a district court's summary judgment order insofar as that order determines whether the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

A First Amendment claim against a public employer must establish: (1) engagement in constitutionally protected speech, (2) an adverse employment action, and (3) the employee's speech was a 'substantial or motivating' factor in the adverse action. *Freitag v. Ayers,* 468 F.3d 528, 543 (9th Cir. 2006). At this stage, Defendants challenge only the conclusion that Robinson's allegations could support a finding that he engaged in constitutionally protected speech under clearly established law.

When evaluating whether an employee's speech is constitutionally protected, courts must "determine first whether the expressions in question were made by the speaker . . . upon matters of public concern, . . . second whether the state lacked adequate justification for treating the employee differently from any other member of the general public," and third "whether the plaintiff spoke as a private citizen, [rather than] a public employee." *Posey v. Lake Pend Oreille Sch. Dist. No. 84,* 546 F.3d 1121, 1130-31 (9th Cir. 2008) (citations omitted).

Even where an employee did engage in constitutionally protected speech, a qualified immunity summary judgment motion requires courts to decide whether the rights the plaintiff claims were "clearly established at the time of the alleged deprivations," viewing "the disputed facts in the light most favorable to [the plaintiff]." *Brewster v. Bd. of Educ.*, 149 F.3d 971, 976-977 (9th Cir. 1998).

Public Concern

To be protected under the First Amendment, an employee's speech must address "a matter of legitimate public concern." *Pickering,* 391 U.S. at 571. "[T]he competency of the police force is surely a matter of great public concern." *McKinley v. City of Eloy,* 705 F.2d 1110, 1114 (9th Cir. 1983). Only speech that deals with "individual personnel disputes and grievances" and that would be of "no relevance to the public's evaluation of the performance of governmental agencies" is generally not of "public concern." *Id.*

Robinson alleges he was retaliated against for, among other things, testifying in a class action lawsuit that the County had engaged in systematic discrimination and harassment against OPS officers, reporting numerous instances of possible corruption, discrimination, or misconduct by fellow OPS officers, and following up on those complaints. With the exception of the three incidents identified by the district court as individual personnel disputes, each of these is clearly a "matter of public concern." *See Thomas v. City of Beaverton,* 379 F.3d 802, 809 (9th Cir. 2004) ("Unlawful conduct by a government employee or illegal activity within a government agency is a matter of public concern."); *Johnson v. Multnomah County,* 48 F.3d 420, 425 (9th Cir. 1995) (citing *Roth v. Veteran's Admin.,* 856 F.2d 1401, 1405 (9th Cir. 1988)) (The "misuse of public funds, wastefulness, and inefficiency in managing and operating government entities are matters of inherent public concern."); *see also*

Connick v. Myers, 461 U.S. 138, 148 (1983) (speech merits stronger protection when employee seeks "to bring to light actual or potential wrongdoing or breach of public trust").

Defendants concede that some of Robinson's "internal reports of certain alleged misconduct involved matters of public concern," but contend that others did not. They argue that Robinson's follow-up communications pressing his reports of misconduct are not "matters of public concern," citing *Douglas v. Lexington-Fayette Urban County Gov't*, 2007 U.S. Dist. LEXIS 82818, at *18 (E.D. Ky. Nov. 7, 2007), which held that plaintiffs' complaints are not matters of public concern where they are "about the job performance of their coworkers" and "the intent of the plaintiffs [is] not to protect public safety, but rather to complain about the management's response to the situation."[1]

Construing the facts in the light most favorable to Robinson, his complaints, unlike those of the plaintiffs in *Douglas,* did not merely contain 'passing references to public safety [that] were 'incidental to the message conveyed,'" *id.,* but rather were motivated by the danger the misconduct posed and the need to respond to it. Whether OPS treats complaints

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[1] Defendants also cite *Akins v. Gates*, 2007 U.S. Dist. LEXIS 68439 (N.D. Ga. Sept. 17, 2007), in support of this proposition, but the plaintiffs' speech in *Akins was* held to be on matters of public concern and unprotected only because it was included in their job duties.

of misconduct seriously or fails to followup is also a matter of "relevance to the public's evaluation of the performance of governmental agencies" and consequently a matter of public concern. *Coszalter v. City of Salem,* 320 F.3d 968, 973 (9th Cir. 2003).

Defendants suggest that Robinson's reports – regarding an officer suspected of working for an outside employer while on the clock and alleged discrimination against another officer – both addressed individual personnel disputes, not matters of public concern. Reports pertaining to others, even if they concern personnel matters including discriminatory conduct, can still be "protected under the public concern test." *Thomas,* 379 F.3d at 808 (explaining that though employee's speech "concerned a personnel matter, it did not pertain to [her] own job status"); *see also Alpha Energy Savers, Inc. v. Hansen,* 381 F.3d 917, 926 (9th Cir. 2004) (holding "invidious discrimination" inherently a matter of public concern "whether it consists of a single act or a pattern of conduct"); *Cochran v. City of Los Angeles,* 222 F.3d 1195, 1201 (9th Cir. 2000) ("Although focused on one employee and not addressed directly to the public, the speech here did concern matters which are relevant to the public's evaluation of its police department.").

Robinson's testimony in a class action against the County is also of public concern, regardless of whether it had an impact on the result of that litigation. *Id.* at 927 ("[A] public employee's testimony addresses a matter of public concern if it contributes in some way to the resolution of a judicial or administrative

proceeding in which discrimination or other significant government misconduct is at issue – even if the speech itself would not . . . in isolation.").

Adequate Justification

Courts must also seek to balance the interests of the employee, "in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S. at 568. "For us to find that the government's interest as an employer in a smoothly-running office outweighs [an employee's] first amendment right, defendants must demonstrate actual, material and substantial disruption," or "reasonable predictions of disruption." *Roth,* 856 F.2d at 1407; *Waters v. Churchill,* 511 U.S. 661, 673 (1994); *see also Keyser v. Sacramento City Unified Sch. Dist.,* 265 F.3d 741, 749 (9th Cir. 2001) (noting that "a showing of actual disruption will weigh more heavily"). "[T]he workplace disruption hurdle for government employers is higher in cases, like this one, where the speech involved unlawful activities rather than policy differences." *Keyser,* 265 F.3d at 749 (citing *Moran,* 147 F.3d at 849 n.6).

Ninth Circuit cases applying *Pickering* to an "employee's reports of 'wastefulness, mismanagement, unethical conduct, violations of regulations, and incompetence'" to his supervisor hold "that the public's interest in learning about illegal conduct by public

officials and other matters at the core of First Amendment protection outweighs a state employer's interest in avoiding a mere potential disturbance to the workplace." *Keyser,* 265 F.3d at 747-48 (discussing *Gilbrook v. City of Westminster,* 177 F.3d 839, 867-70 (9th Cir. 1999); *Roth,* 856 F.2d at 1403-08; and *Johnson,* 48 F.3d at 425-27). In the context of "good-faith whistleblowing" involving reports within a government department rather than to the public, "the breadth of one's audience is irrelevant" because "[i]t would be absurd to extend First Amendment protection only to those whistleblowers who immediately appear on the local news." *Hufford v. McEnaney,* 249 F.3d 1142, 1150 (9th Cir. 2001).

Chain of Command

Defendants argue an exception to this clearly established law exists, citing *Sanchez v. City of Santa Ana,* 936 F.2d 1027, 1039 (9th Cir. 1990), which states that there is "no constitutional violation in requiring officers to communicate 'through channels' before enlisting public opinion to their cause." *Sanchez* limited its holding, however, to cases where the "channels" policy "is reasonable and not arbitrary." *Id.* "[E]ven in a police department, the complained-of disruption must be 'real, [and] not imagined'" and the "disruption exception cannot 'serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views.'" *Allen v. Scribner,* 812 F.2d 426, 432 (9th Cir. 1987) (citing *McKinley,* 705 F.2d at 1115); *accord Brockell v. Norton,* 732 F.2d 664,

667 (8th Cir. 1984) (courts cannot "decide in the abstract, however, that a chain-of-command policy designed to protect [a police department's] interest[s] will always take precedence over the interest of a public employee in open communication" and "must look to the particular circumstances of each case to determine the importance of enforcing the chain of command against an employee whose speech breaches that policy").

The *Pickering* balancing test can favor protected speech even where the speech violates the employer's written policy requiring speech to occur through specified "channels." *Anderson v. Central Point School Dist.*, 746 F.2d 505, 506 (9th Cir. 1984); *see also Connick*, 461 U.S. at 153 n.14 (violation of a rule governing the circumstances when speech is permitted would strengthen a claimant's position in the *Pickering* balance, but alone would not be dispositive).

Defendants correctly note that we have sometimes found a police department's interests in discipline and *esprit de corps* to outweigh First Amendment interests, but even in these cases, the *Pickering* balancing was not conducted while genuine issues of material fact (including the extent of the workplace disruption) remained. *See, e.g., Cochran*, 222 F.3d at 1196 (finding the city's interest in the proper functioning of its police department outweighed plaintiffs' expressive interests, but only after a detailed discussion of the facts as found at trial); *Kannisto v. San Francisco*, 541 F.2d 841, 843-44 (9th Cir.

1976) (noting that "[t]he facts in this case sharply contrast with those in *Pickering*").

Therefore, although the existence of a written "chain of command" policy may be relevant to evaluating workplace disruption, it is not dispositive, particularly given the allegations suggesting that Robinson's superiors may have been more concerned with the frequency with which Robinson reported misconduct than the persons to whom he directed those reports. When the *Pickering* test must be applied and "there are underlying factual issues regarding the extent of office disruption," it is proper to deny a motion for summary judgment. *Roth*, 856 F.2d at 1408.

Scope of Job Duties

Defendants also argue that Robinson's reports were made in conjunction with his official job duties and therefore were not protected by the First Amendment under *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The district court found that whether the scope of Robinson's duties included reporting police misconduct was contested and presented a "genuine issue of material fact for trial," a holding we lack jurisdiction to review. *See Johnson*, 515 U.S. at 319-20. In so concluding, the district court noted that the message that Robinson should make fewer misconduct reports, which he claims he repeatedly received from his supervisors, "tends to undermine the assertion by Defendants that the reports Robinson made were

within the scope of his duties unless one is to believe that certain duties must not be performed if one wants to advance in the organization."

Although OPS policy states that an OPS member "shall promptly report to his immediate supervisor any information or incident coming to his attention that might indicate the need for Office of Public Safety actions," formal job requirements are not dispositive. *Garcetti* rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions," holding that formal job descriptions are "neither necessary nor sufficient to demonstrate that conducting [a] task is within the scope of the employee's professional duties." *Garcetti*, 547 U.S. at 424-25. *Garcetti* therefore demands a "practical" inquiry. *Id.*

Under Ninth Circuit precedent, the scope of Robinson's job duties is a question of fact. *Posey*, 546 F.3d at 1130. "[W]hen there are genuine and material disputes as to the scope and content of the plaintiff's job responsibilities, the court must reserve judgment . . . until after the fact-finding process." *Id.* at 1131.

Qualified Immunity

Because a "constitutional right would have been violated were [the plaintiff's] allegations established," the next step in evaluating a claim to qualified immunity "is to ask whether the right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). "Whether an official protected by qualified

immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton,* 483 U.S. 635, 639 (1987) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818-19 (1982)). The plaintiff "bears the burden of proving that the rights [he] claims were 'clearly established' at the time of the alleged violation." *Moran,* 147 F.3d at 844. The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson,* 483 U.S. at 640. "Notwithstanding this particularity requirement, 'closely analogous preexisting case law is not required to show that a right was clearly established.'" *Hufford,* 249 F.3d at 1148 (citing *White v. Lee,* 227 F.3d 1214, 1238 (9th Cir. 2000)).

All of the key decisions discussed *supra* were decided well before April of 2005, when Robinson first might have been considered for promotion to lieutenant. The Supreme Court had decided *Pickering,* establishing that the First Amendment protects employee speech on matters of "legitimate public concern," in 1968. *Pickering,* 391 U.S. at 571-72. It was also already clear that only a "real, not imagined, disruption" might outweigh the expressive interests of the employee, that this exception cannot serve as a "pretext," and that "employers would be required to make an even 'stronger showing' of disruption when the speech dealt . . . directly with issues of public

concern." *McKinley,* 705 F.2d at 1114. An employer's written policy requiring speech to occur through specified "channels" had been held insufficient to justify retaliation motivated by protected speech. *Anderson,* 746 F.2d at 506. "[M]isuse of public funds, wastefulness, and inefficiency in managing and operating government entities" had been held "matters of inherent public concern." *Roth,* 856 F.2d at 1405. Therefore, at the time defendants acted in 2005 and 2006, both the constitutional protection of employee speech and a First Amendment cause of action for retaliation against protected speech were clearly established and potentially applicable to defendants' conduct.

In 2006, the Supreme Court clarified the existence of an exception to these precedents, holding unprotected "expressions employees make pursuant to their professional duties." *Garcetti,* 547 U.S. at 426. If the plaintiff's version of the facts, including his professional duties, turns out to be inaccurate, defendants may then be entitled to qualified immunity under *Garcetti.* At this stage, however, the court evaluates only the sufficiency of the plaintiff's factual allegations and therefore "must reserve judgment on this third prong of the protected status inquiry until after the fact-finding process." *Posey,* 546 F.3d at 1131. The district court's denial of summary judgment is therefore

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD ROBINSON, Plaintiff-Appellee, v. COUNTY OF LOS ANGELES; MARGARET YORK; WILLIAM NASH; VICTOR TURNER, Defendants-Appellants.	No. 07-56312 D.C. No. CV-06-02409-GAF Central District of California, Los Angeles ORDER (Filed Apr. 3, 2009)

Before: CUDAHY,* PREGERSON and HAWKINS, Circuit Judges.

Appellants' Motion to Stay Mandate Pending Petition for Writ of Certiorari is GRANTED.

* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 06-2409 GAF (VBKx) Date August 7, 2007

Title
Robinson v. County of Los Angeles, et al

Present: The Honorable **GARY ALLEN FEESS**

Marilynn Morris	None	N/A
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: (In Chambers)

ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

(Filed Aug. 8, 2007)

I. INTRODUCTION

In this case Plaintiff Richard Robinson, a public employee with the County of Los Angeles, claims that he was denied a promotion because he made reports of misconduct within his department. Defendants now move for summary judgment claiming, among other things, that: (1) his reports were made as part of his official duties and so not protected under the First Amendment, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); and (2) he is barred from any recovery in

this case because he failed to present these reports through his chain of command in violation of an unambiguous written departmental policy. Plaintiff counters with his own motion for summary judgment in which he asserts, in substance, that the written policy constitutes a prior restraint on his First Amendment rights.

Both motions are **DENIED**. The record reveals that, at the very least, genuine issues of material fact remain for trial as to whether or not Robinson's job duties encompassed the reporting of misconduct. Furthermore, although the record establishes that Robinson's department had an established, written "chain of command" policy and that Robinson plainly violated that policy, neither fact dictates the outcome of the pending lawsuit. Rather, the Court considers these facts as part of the balancing test established in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), and concludes that, if Robinson establishes the remaining elements of his retaliation claim, his speech interests outweigh the department's interest in managing the workplace activities of its employees. Finally, because the constitutional right at issue in this case is well-established, Defendants cannot assert the defense of qualified immunity to the claim and Robinson may, on a proper showing, recover punitive damages from the individual defendants. Finally, the "chain of command" policy is not an impermissible prior restraint on Plantiff's [sic] First Amendment rights. A more detailed discussion of the Court's ruling follows.

II. FACTUAL BACKGROUND

Plaintiff Richard Robinson, who holds the rank of sergeant, works as an officer of the County of Los Angeles Office of Public Safety. Having received favorable work reviews over the years, he took an examination in 2003 to become eligible for promotion to lieutenant. He was eventually placed in the highest band of candidates but was not promoted before the eligibility list expired in 2006. Robinson now contends that he was not promoted because his superiors were retaliating against him for reporting misconduct in the department in violation of his First Amendment rights, and brings this Section 1983 suit against the County, Chief Margaret York, and high ranking officers William Nash and Victor Turner.

The undisputed facts reflect that Robinson was involved in a number of what can be broadly described as reports of misconduct within the department over a period of years, including the period when he was eligible for promotion. His "reports" include the following:

> 1. Testifying against the County in a May 2002 class action lawsuit alleging that the County engaged in systematic discrimination and harassment against sworn OPS officers;
>
> 2. Reporting possible corruption by fellow officer Mitch Grace, who was allegedly working for an outside employer while "on the clock" for the county;

3. Reporting possible drinking by sworn police officers during work hours;

4. Following up with Internal Affairs, Defendant Nash, and others in December 2003 and February 2004, when it appeared that nothing was being done regarding his reports of corruption and on-duty drinking;

5. Reporting the display of distinctive tattoos on the bodies of several members of the OPS training unit, reminiscent of the questionable "Viking" tattoos sported by members of the Los Angeles Sheriff's Department, and suggesting the possibility of racist or anti-Semitic attitudes by members of the unit;

6. Reporting a possible battery on a police explorer;

7. Filing an official complaint with Internal Affairs regarding fellow officer and friend Nancy Leiva, who was allegedly a victim of racial and ethnic discrimination in connection with the display of a sign that read "Parking for Irish Only";

8. Reporting a possible use of excessive force incident that he heard had occurred during the detention of a suspect;

9. Reporting Lt. Pucciarelli's alleged harassment and verbal abuse toward Robinson in front of numerous OPS employees because Robinson complained when Pucciarelli sent two officers home for arriving late to a meeting;

> 10. Filing a complaint for arbitration in response to a written reprimand he received for violating OPS policy and procedures when he sought a tape of a radio transcription regarding an incident where an officer failed to respond to a request for assistance in connection with a mini-riot and instead spent an hour and a half with a lifeguard while on duty; and
>
> 11. Reporting an alleged sexist remark by an officer who reportedly told police explorers that a female officer would be able to instruct them only in the proper application of lipstick or makeup.

In support of his contention that he was not promoted because of his speech activities, Robinson submits evidence that Defendants York, Nash, and Turner took part in a "roundtable" discussion of candidates for promotion. When Robinson's name came up, those present expressed concerns that the issues that he raised and the manner in which he raised them was a cause for concern. Among other things, those present were troubled by Robinson's failure to present his complaints through the normal chain of command as prescribed by departmental policy. In a separate conversation, Defendant Nash allegedly told Robinson that "if you didn't bring so many issues forward or didn't bring such issues, as many issues to light, maybe that might help in terms of your getting promoted to lieutenant." When Robinson asked whether he should tone down or slow down the complaints to

get promoted, Nash reportedly said that "it might help."

III. Discussion

On these motions for summary judgment, the Court's task is not to resolve factual disputes but to determine whether such disputes exist and, if not, whether judgment can be entered for the moving party as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

A. Defendants' Motion for Summary Judgment

1. The Retaliation Claim

To establish a prima facie case of First Amendment retaliation, a plaintiff must demonstrate that (1) he engaged in constitutionally protected speech; (2) the defendants took an adverse employment action against him; and (3) the employee's speech was a "substantial or motivating" factor for the adverse action. *Freitag v. Ayers*, 468 F.3d 528, 543 (9th Cir. 2006). For the first element – whether he engaged in protected speech – the Court must engage in a three-step inquiry. First, the court must determine whether the plaintiff spoke as a citizen, rather than as a public employee pursuant to his official duties. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006). Second, the court must determine whether the speech touched on matters of public concern. *Connick v. Myers*, 461 U.S. 138, 147 (1983). Third, if the speech does pertain

to matters of public concern, then the court must determine under the balancing test established in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), whether the employee's free speech interests outweigh the employer's interests in preventing workplace disruption. *Moran v. State of Washington*, 147 F.3d 839, 846 (9th Cir. 1998).

i. Protected Speech – Application of the Garcetti Test

(a). Speaking as a Citizen

Whether or not Robinson was speaking as a citizen or was acting within the course and scope of his duties presents a genuine issue of material fact for trial. Defendants contend that all of the complaints were presented pursuant to his duties as a peace officer for OPS. Among other things, they cite County policy providing that "[a] member [of OPS] shall promptly report to his immediate supervisor any information or incident coming to his attention that might indicate the need for Office of Public Safety actions." However, *Garcetti* implies, and district court cases interpreting *Garcetti* hold, that a general policy or responsibility to report misconduct does not establish a day-to-day duty on the part of any person other than those, like Internal Affairs officers, whose express duties include the investigation of departmental misconduct. *Garcetti*, 126 S. Ct. at 1959-60; *Abbatiello v. County of Kauai*, Civ. No. 04-00562 SOM, 2007 WL 473680 (D. Haw. Feb. 7, 2007) (declaration of officer indicating that duties did not

include reporting misconduct created genuine issue of fact for trial); *Walters v. County of Maricopa*, No. CV-04-1920-PHX-NVW, 2006 WL 2456173, at *14 (D. Ariz. Aug. 22, 2006) (sergeant's reporting of police misconduct, when he had no official duty to report it, was protected by First Amendment). Plaintiff asserts that nothing in his job description imposes any sort of reporting requirement on him, and testified that his superiors suggested that he was passed over for promotion because he made his reports of misconduct. Whether Robinson was in fact passed over for promotion because he made these reports raises an issue of fact for trial, and, if believed, would undermine the assertion by Defendants that the reports Robinson made were within the scope of his duties unless one is to believe that certain duties must not be performed if one wants to advance in the organization. Accordingly, on the state of the present record, the scope of Robinson's duties cannot be resolved as a matter of law.

(b). Matters of Public Concern

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. Although context is relevant (for example, did the speech involve a private conversation among co-workers or to a supervisor or manager), the most important consideration is "the content of the speech." *Weeks v. Bayer*, 246 F. 3d 1231, 1234 (9th Cir. 2001).

Whether screech addresses a matter of public concern presents a question of law, not of fact. *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 923 (9th Cir. 2004) (citing *Connick*, 461 U.S. at 148 n.7).

Without addressing the merits of the matters reported by Robinson, they clearly did not involve private communications between co-workers and clearly focused on issues of public concern, including, but not limited to: (1) testifying in court in an action involving allegations of racial, ethnic and gender-based harassment and discrimination; (2) reporting suspected corruption involving an officer on the public payroll performing work for an outside employer while on the clock; (3) reporting suspected alcohol consumption by officers on duty who may drive county-owned vehicles after drinking; and (4) seeking meetings with superiors to determine what, if anything, they were doing regarding the foregoing allegations. The Court has found only three of the incidents cannot be called matters of public concern: (1) the verbal abuse issue, which involves Robinson's displeasure at his treatment by a superior officer, constitutes "an individual personnel dispute and grievance," *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003); (2) the "radio tape matter," which is not even mentioned in the complaint, again involves an internal personnel dispute between Robinson and the department; and (3) the "makeup/lipstick" matter, also not included in the complaint, focuses not on the sexism issue but rather on Robinson's dispute with his superiors over their decision to terminate the meeting. The Court

will not permit the case to proceed with respect to these complaints, but the record before the Court plainly establishes that the remaining reports addressed issues that are matters of public concern.[1]

(c). The Pickering Balancing Test: Speech v. Workplace Disruption

Given that several of Plaintiff's complaints constitute protected speech, the Court must turn to the constitutional balance in which Robinson's speech interests are weighed against his employer's interests in preventing potential workplace disruption. *Pickering*, 391 U.S. 568; *Morgan*, 147 F.3d at 846. The *Pickering* balancing test provides:

[1] Defendants, in their motion and at oral argument, contend that Plaintiff's undisputed violation of the "chain of command" policy in and of itself nullifies Plaintiff's assertion that his speech involved matters of public concern The only case cited in support of this proposition, *Guilloty Perez v. Pierluisi*, 339 F.3d 43 (1st Cir. 1993), merely noted that the plaintiff complained to his supervisors in his chain of command, not that such action was required for First Amendment protection. The Court has reviewed applicable case law and found no case holding (or even suggesting) that a consideration of an employer's policies must be undertaken to determine whether an employee's speech addressed an issue of "legitimate public concern." *See Connick*, 461 U.S at 147-48. The argument is more properly considered in the Court's application of the *Pickering* balancing test. In addition, Defendants cite no controlling case law to support their assertion that violating the "chain of command" policy automatically deprives Plaintiff of his First Amendment rights to protected speech.

> The question of whether speech of a government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 284 (1977) (quoting *Pickering*, 391 U.S. at 568). "The employer bears the burden of proving that the balance of interests weighs in its favor." *Johnson v. Multnomah County*, 48 F.3d 420, 426 (9th Cir. 1995).

The proper balancing of an employee's First Amendment interests and the public employer's interest in the maintenance of a collegial and efficiently operating workplace presents a question of law for resolution by the Court. *Roth v. Veteran's Admin. of the United States*, 856 F. 2d 1401, 1407 (9th Cir. 1988). However, whether and to what extent the speech actually disrupted the workplace is a question of fact that must be resolved by the trier of fact before the Court can engage in constitutional balancing. Id., at 1408. Potential factual questions include:

> whether the speech (1) impaired discipline or control by superiors; (2) disrupted co-worker relations; (3) eroded a close working relationship premised on personal loyalty and confidentiality; (4) interfered with the speaker's performance of his or her duties; or (5) obstructed routine office operations. *See*

> *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1331 n.1 (9th Cir. 1997) (citing those factors), *cert. denied*, 523 U.S. 1074, 118 S. Ct. 1517, 140 L. Ed. 2d 670 (1998). "[P]ublic employers need not allege that an employee's expression actually disrupted the workplace; 'reasonable predictions of disruption' are sufficient." *Brewster*, 149 F.3d at 979 (quoting *Waters v. Churchill*, 511 U.S. 661, 673, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994) (plurality opinion)). Moreover, this court has weighed (6) whether the speaker directed the statement to the public or the media, as opposed to a governmental colleague, *id.* at 981; (7) whether the speaker served in a high-level, policy-making capacity; and (8) whether the statement was false or made with reckless disregard of the truth, *see Moran v. Washington*, 147 F.3d 839, 849-50 (9th Cir. 1998) (considering those last two factors). Because the *Pickering* balance necessarily involves a fact-sensitive inquiry involving the totality of the circumstances, no single factor is dispositive.

Gilbrook v. City of Westminster, 177 F.3d 839, 867-68 (9th Cir. 1999).

Taking these cases into account and applying them in the present context, the Court concludes that Defendant cannot succeed on the present motion unless it demonstrates the impact of Robinson's speech activities on the operation of OPS through undisputed facts. If genuine issues of material fact remain regarding the existence of the *Gilbrook* factors, the

Court cannot undertake the summary resolution of the *Pickering* balancing test. Because disruption of co-worker relationships, erosion of employee discipline, interference with managerial control, and the obstruction of routine operations have not been established as a matter of undisputed fact, the Court cannot perform the *Pickering* balance at this stage of the proceedings. Moreover, since it is undisputed that Plaintiff is not a high-level official working in a policy-making capacity, that factor works in favor of the Plaintiff. For all of these reasons, the Defendant has not met its burden of showing that the underlying facts on which this Court should base its balancing have been established

In sum, because Defendants fail to establish as a matter of law that Plaintiff's speech is not protected, the motion fails on that basis alone. However, the Court continues with the rest of the First Amendment inquiry.

ii. Adverse Employment Action

The record unambiguously establishes that Robinson suffered an adverse employment action – he was passed over for promotion on multiple occasions despite being placed in the highest "tier" of candidates seeking promotion to lieutenant. Thus, the second prong of the inquiry is established.

iii. "Substantial or Motivating" Factor

Finally, Plaintiff proffers sufficient evidence to create a genuine issue of material fact as to whether Robinson's multiple complaints over the years were a "substantial or motivating" factor in the County's decision not to promote Robinson. Robinson presents evidence that during the relevant time period, numerous personnel, including Nash, Turner, and Captain Lieberman, allegedly made statements regarding Robinson's need to keep quiet, or else he would not get promoted. These statements suggest that the proffered explanations for his lack of promotion were pretextual, and thus creates genuine issues of fact as to whether his complaints were a "substantial or motivating" factor for his lack of promotion. *Coszalter*, 320 F.3d at 977.

Thus, Defendants cannot demonstrate that they are entitled to summary judgment on Robinson's First Amendment retaliation claim. Accordingly, the motion on this ground is **DENIED**.

2. Qualified Immunity of Individual Defendants and Claim for Punitive Damages

If Plaintiff is believed, at least some of the Defendants have deliberately retaliated against him based on his exercise of his protected First Amendment rights. Plaintiff has testified to conversations with various defendants that a jury could reasonably conclude demonstrate a retaliatory animus. Even so,

Defendants contend that the individual Defendants – York, Nash, and Turner – are entitled to qualified immunity for any such statement made or actions taken.

The qualified immunity analysis involves two steps. First, "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If yes, then the court must ask whether that right was "clearly established" at the time of the violation. *Id.* Here, if Plaintiff proves his case, he will have established that he spoke out on matters of public concern that were outside the scope of his duties as an OPS sergeant. Moreover, the law has been clear for almost 40 years that public employees have First Amendment rights, that speaking out on matters of public concern is protected speech, and that they cannot suffer an adverse employment action for speaking out on matters of public concern so long as their conduct does not disrupt the employment relationship. *See, e.g., Coszalter*, 320 F.3d at 979 (citing *Pickering*, 391 U.S. at 571). Defendants are, therefore, not entitled to qualified immunity. For the same reasons, Plaintiff may, upon a proper showing, recover punitive damages from these defendants in their individual capacities. *See Larez v. City of Los Angeles*, 946 F.2d 630, 640-41 (9th Cir. 1991). It will be for a jury to determine whether these supervisors acted with malice, fraud, or oppression.

For these reasons, the motion on the qualified immunity and punitive damages grounds is **DENIED**.

B. Plaintiff's Motion for Partial Summary Judgment

Plaintiff also moves for summary judgment on the ground that the County's policy requiring that complaints be made through the chain of command is unconstitutional because it is an impermissible prior restraint. In support of his motion, Plaintiff relies entirely on *Anderson v. Central Point School District No. 6*, 554 F. Supp. 600 (D. Or. 1982), *rejected on other grounds by Pochiro v. Prudential Insurance Co. of America*, 827 F.2d 1246 (9th Cir. 1987).

In *Anderson*, plaintiff, a teacher and coach, wrote to the school board with suggestions on the school district's athletic policies and programs. *Id.* at 603-04. Under local policy, no one was supposed to contact the board directly, but rather was to give advance notice to the superintendent of any direct message to the board. *Id.* at 608. Due in part to his violation of this policy, plaintiff was not assigned a coaching role. *Id.* at 604. The district court held that this "channels policy" was an impermissible prior restraint on speech. *Id.* at 608.

The Court concludes that *Anderson* does not apply in this case and is readily distinguishable. First, two different types of organizations are at issue here – having a channels policy for a school board is

less important than having a chain of command for a law enforcement agency. Second, the interests behind the two policies differ markedly. In *Anderson*, the interest was to save board members' time by using managerial personnel as a screen. Here, however, the issue involves the rights of police officers whose conduct is called into question, which encompasses privacy rights. Third, the actual policies differ. The policy in *Anderson* included a direct ban on any contract [sic] with board members, who are elected officials, about anything involving the school district, while the policy here addresses the method for handling internal complaints. And fourth, the Ninth Circuit has held that law enforcement agencies are entitled to substantial deference in establishing policies for reporting suspected misconduct. *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1039 (9th Cir. 1990) (police department's "policy of bringing grievances first through appropriate channels to authorities in the department before bringing them to the City or the public is reasonable and not arbitrary"). For these reasons, Plaintiff has not demonstrated, as a matter of law, that the "chain of command" policy is unconstitutional, and his motion is **DENIED**.

IV. CONCLUSION

For the foregoing reasons, both motions are **DENIED**.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
NOV 20 2009
OFFICE OF THE CLERK

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No. 08-1462

In The Supreme Court of the United States

MARGARET YORK, WILLIAM NASH and VICTOR TURNER,

Petitioners,

v.

RICHARD ROBINSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Under the First Amendment analysis in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), should a district court decide material disputes over the scope and content of a public employee's job duties as a matter of law on summary judgment?

2. Despite the absence of any meaningful circuit split, should review be granted to advise courts on what factors should and should not be included in its inquiry into the scope and content of an employee's official job duties?

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INTRODUCTION

In *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), this Court held that speech made by a public employee pursuant to his official job duties is not entitled to First Amendment protection. The Court made clear that the inquiry into whether the employee spoke pursuant to his official job duties is a "practical one" that involves a factual examination of "the duties an employee actually is expected to perform." *Id.* at 424.

Applying this standard, the Ninth Circuit affirmed the District Court's decision that there were genuine and material disputes as to the scope and content of the respondent's job responsibilities rendering it impossible to determine on summary judgment whether he spoke pursuant to his official responsibilities or as a citizen. Pet. App. 10. Claiming a circuit split, petitioners argue that review is warranted to resolve the issue of whether the scope of a public employee's job duties is a question of law or a question of fact.

Of significance is the fact that this Court just recently denied review of this exact same issue in *City of Maywood v. Densmore*, 2009 WL 481278. In this case, petitioners make the same arguments and cite the same cases. Although some cases cited by petitioners hold that the ultimate question of whether an employee was speaking as an employee or a citizen is a question of law, none of them resolve the underlying dispute about the employee's actual job duties

at the summary judgment stage. Here, both the District Court and the Ninth Circuit recognized that there was conflicting factual evidence as to what duties Robinson was expected to perform. As a result, the court below correctly denied summary judgment. Since there is no meaningful split in the circuits, there is no compelling reason for this Court to grant review and advise courts on case-specific criteria to apply when determining whether an employee spoke as an employee or as a citizen.

STATEMENT OF THE CASE

Respondent Richard Robinson was employed as a police sergeant with the County of Los Angeles. Pet. App. 34. Between 2002 and 2006, Robinson disclosed numerous instances of policy and law violations by other officers within the County. *Id.* at 34-35.

His disclosures included the following:

1. Testifying against the County in a May 2002 class action lawsuit alleging that the County engaged in systematic race discrimination and harassment against officers;

2. Reporting possible corruption by an officer who was allegedly working for an outside employer while "on the clock" for the County;

3. Reporting drinking on duty by sworn police officers while driving County vehicles;

4. Following up with Internal Affairs and others in December 2003 and February 2004 when it appeared that nothing was being done regarding his reports of corruption and on-duty drinking;

5. Reporting the display of distinctive tattoos on the bodies of several officers working in the training unit, reminiscent of the questionable "Viking" tattoos sported by members of the Los Angeles Sheriff's Department, and suggesting the possibility of racist and/or anti-Semitic attitudes by members of the unit;

6. Reporting a possible battery on a police explorer by an officer;

7. Filing an official complaint with Internal Affairs regarding possible racial and ethnic discrimination; and

8. Reporting a possible use of excessive force incident. *Id.* at 34-35.

In addition, after receiving favorable work reviews over the course of three years, Robinson took a promotional examination in 2003 to promote to police lieutenant. *Id.* at 4. He was eventually placed in the highest band of candidates, with nine other candidates. Pet. App. 4; Appellant's Excerpts of Record in the Ninth Circuit (Ct. App. ER) at Vol. IV, 526.

Between 2003 and 2006, eight of the ten candidates from Robinson's band (band I) were promoted and three candidates from the second band were promoted. However, Robinson was not one of the candidates selected for promotion and the promotional list expired in 2006. *Id.*

During the promotional process, Robinson spoke with various officials, including petitioners William Nash and Victor Turner, to determine why he wasn't being selected for promotion. At the time, Nash and Turner were bureau chiefs for the County and were directly below the chief of police in the chain of command. As bureau chiefs, Nash and Turner were intimately involved in the decision-making process for promotional selections. Pet. App. 3; Ct. App. ER at Vol. IV, 527, 611.

Essentially, Nash and Turner told Robinson that the aforementioned instances where Robinson "blew the whistle" and disclosed internal misconduct were being held against him. Ct. App. ER at Vol. IV, 571. Nash testified that Robinson's disclosures "could cause some concern with promoting him to lieutenant" and suggested that "if you didn't bring so many issues forward or didn't bring such issues, as many issues to light, maybe that might help in terms of your getting promoted to lieutenant." *Id.* Nash testified that Robinson's response to what Nash advised him was "Well, so you think that maybe I should back off or slow down?" *Id.* at 581. Nash then admitted he told Robinson "[i]t might help," or something along those lines. *Id.* at 580. Nash concluded by telling

Robinson that he "hoped that this conversation wouldn't come back to bite [him] one day." *Id.* at 582.

Turner likewise advised Robinson that he could not promote him because of his prior reporting of misconduct and candidly advised Robinson that "sometimes things are better swept under the rug." *Id.* at 611. On a separate occasion, Turner was overheard advising someone that "Sergeant Robinson will never promote because he makes too many complaints against supervision. He reports too much misconduct." *Id.* at 609.

In addition, two police captains with the County each made similar statements. Captains Hector Lemus and Steve Lieberman also told Robinson that he was not going to be promoted due to his disclosures. *Id.* at 612.

After failing to obtain a promotion, Robinson filed this action alleging that he had been denied promotion in retaliation for exercising his First Amendment rights. The defendants moved for summary judgment, arguing that Robinson's reports were not protected speech because they were made as part of his professional duties as a peace officer. More specifically, the defendants argued that because the County maintained a written policy stating that an officer must report "information" that "might indicate the need for Office of Public Safety actions," Robinson's speech was automatically made pursuant to his professional duties and unprotected as a matter of law.

The District Court declined to apply the defendants' rigid and per se approach, and instead denied the motion finding genuine issues of material fact on the scope of Robinson's job duties and holding that a violation of a written chain of command policy was not dispositive, but merely one of the factors to be considered. Pet. App. 38-39. Defendants Margaret York, William Nash and Victor Turner then appealed the District Court's denial of summary judgment on the issue of qualified immunity.

On January 8, 2009, the Ninth Circuit affirmed the District Court's decision again reiterating that there are genuine and material factual issues in dispute as to the scope and content of Robinson's job duties. In recognition that the inquiry into one's job duties requires a "practical one" that involves a factual examination of "the duties an employee actually is expected to perform," the Ninth Circuit reserved judgment until after the fact-finding process. Pet. App. 19, 27.

Upon application of respondent seeking publication of the court's decision, on April 27, 2009, the Ninth Circuit withdrew its memorandum and issued a published opinion. Pet. App. 1.

REASONS FOR DENYING THE PETITION

I. There Is No Meaningful Circuit Split Over Whether The Scope Of A Public Employee's Job Duties Is A Question Of Law Or A Question Of Fact.

1. Petitioners' primary argument for review is that there is a circuit split over whether the scope of a public employee's job duties is a question of law or a question of fact. Petitioners claim that courts have applied varying and inconsistent criteria in determining an employee's job duties and that there is resulting uncertainty and confusion. However this is not the case.

Although some courts describe the *ultimate question* of whether a public employee is speaking as a citizen or as an employee as a question of law, no case cited by petitioners hold that where there is a dispute over the scope and content of an employee's actual job duties – as was found here by the District Court and affirmed by the Ninth Circuit – that dispute should be resolved by a court.

Petitioners contend that the decision below is in conflict with the First, Fifth, Tenth, Eleventh and D.C. Circuits. For example, petitioners contend that the decision below is in conflict with D.C. Circuit's opinion in *Wilburn v. Robinson*, 480 F.3d 1140 (D.C. Cir. 2007). However, the case presented no factual disputes with regard to the scope and content of the employee's job duties, and in fact, the employee believed that her job required her to make such

disclosures. *Id.* at 1150. Similarly, the petitioners' reliance upon the Fifth Circuit case, *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008) is also inapplicable. In *Charles*, the court stated that the *ultimate question* of whether "speech is entitled to protection" is a matter of law. *Id.* at 513, n. 17. Again, the court did not mention any material disputes over the employee's job duties, and specifically found that the employee was not speaking as an employee under any "conceivable job duties." *Id.* at 514. The court had no occasion to comment upon the nature of the inquiry if any factual dispute did exist. More importantly, in a post-*Charles* case involving an employee whose official job duties were unclear, the court denied summary judgment. *See Williams v. Riley*, 275 F.Appx. 385 (5th Cir. 2008).

The petitioners also rely on *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007). Although the court stated that the ultimate question of whether an employee is speaking pursuant to his official job duties is a question for the court, the court was not faced with a case involving a factual dispute as to the scope and content of the employee's job duties. However, the court noted that it was "viewing the evidence in the light most favorable to the plaintiffs," *id.* at 1204, suggesting that there may be times when summary judgment would be inappropriate due to a factual dispute. From the First Circuit, the petitioners rely upon *Curran v. Cousins*, 509 F.3d 36 (1st Cir. 2007) and *Lewis v. City of Boston*, 321 F.3d 207 (1st Cir. 2003). In *Curran*, the

First Circuit specifically found that "the material facts were not disputed" and thus "[t]he issues were ones for the court to decide." *Curran*, 509 F.3d at 45. *Lewis* is a pre-*Garcetti* decision and provides no insight into whether the *Garcetti* inquiry is one of law or fact.

Finally, petitioners cite several Eleventh Circuit decisions in passing, including *Boyce v. Andrew*, 510 F.3d 1333 (11th Cir. 2007), *Battle v. Bd. of Regents for the St. of Ga.*, 468 F.3d 755 (11th Cir. 2006), *Morris v. Crow*, 117 F.3d 449 (11th Cir. 1997), *Burton v. City of Ormond Beach, Fla.*, 301 F.Appx. 848 (11th Cir. 2008), and *Schuster v. Henry County Ga.*, 281 F.Appx. 868 (11th Cir. 2008). Each of these cases, like the others, do not involve situations where the scope and content of the employee's job duties are unclear and where factual disputes exist. In fact, in *Battle*, the court noted that the employee's speech was clearly a part of the employee's official job duties. *Battle*, 468 F.3d at 761. In *Burton*, the Court found that "no 'serious debate' exists" and that the speech was pursuant to his job duties. *Burton*, 301 F.Appx. at 852. In *Schuster*, the employee admitted he had an obligation to engage in the speech. *Schuster*, 281 F.Appx. at 870. Furthermore, *Morris* is a pre-*Garcetti* case and is of no support to the petitioners' position.

Contrary to the petitioners' assertion, the appellate courts are not squarely at odds over this issue. Petitioners have not demonstrated that the appellate courts that describe the ultimate question as being a "matter of law" would resolve cases at summary

judgment when those cases involve factual disputes about what duties an employee is actually expected to perform. The Ninth Circuit is in line with every other circuit in that once the factual dispute over the scope of the employee's job duties is resolved, the "'ultimate constitutional significance of the facts as found' is a question of law." *Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009), quoting *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008). Accordingly, when no factual disputes do exist as to the scope of the employee's job, the Ninth Circuit has routinely decided the ultimate issue of whether the speech was made as a citizen or an employee as a matter of law. *See White v. Nevada*, 312 F.Appx. 896 (9th Cir. 2009); *Brown v. Hawaii*, 2009 WL 330209. The Third Circuit, which the petitioners claim is on the same side as the Ninth Circuit in the purported split, does the same. *See Gorum v. Sessons*, 561 F.3d 179 (3rd Cir. 2009). Since there is no meaningful circuit split here, review is unnecessary.

2. Banking on its purported circuit split, petitioners ask this Court to intervene and declare that the scope of an employee's job duties should be decided by the court as a matter of law. However, deciding as a matter of law that Robinson's speech was made pursuant to his official job duties would be inconsistent with *Garcetti*'s pronouncement that the proper inquiry is "a practical one." *Garcetti*, 547 U.S. at 424. In fact, petitioners' entire claim that Robinson spoke pursuant to his official job duties is predicated

almost exclusively on a written policy that arguably does not apply to Robinson's disclosures.[1] *See* Ct. App. ER at Vol. II, 37-40. *Garcetti* holds that the proper inquiry must focus on "the duties an employee is actually expected to perform," and not the "[f]ormal job description." *Garcetti*, 547 U.S. at 424-25.

Questions about what duties a public employee is expected to perform, when in genuine dispute, involve precisely the "application of those ordinary principles of logic and common sense experience which are ordinarily entrusted to the finder of fact." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501, n. 17 (1984). Although the ultimate question may be a legal question for a judge to decide, subsidiary factual questions are appropriately addressed to the finder of fact. *Miller v. Fenton*, 474 U.S. 104 (1985).

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[1] Petitioners also suggested that Robinson spoke pursuant to his official job duties because he is a police officer and "police officers are literally on duty 24 hours a day under California law." *See* Ct. App. ER at Vol. II, 38. Recognizing that the argument would essentially eradicate First Amendment protection for police officers who blow the whistle, petitioners have abandoned that claim on appeal.

II. There Is No Meaningful Circuit Split Over The Factors Courts Have Used In Determining Whether Public Employee Speech Falls Within One's Official Duties.

Attempting to breathe life into its petition, petitioners claim that the circuit courts have applied varying or inconsistent factors in deciding whether a public employee's speech is taken pursuant to the employee's official job duties. This is simply not true.

Petitioners argue that several courts have held that whether the employee directed the speech to supervisors or others within the chain of command determines whether the particular communication falls within the employee's official duties. By contrast, petitioners claim that the District Court rejected petitioners' contention that Robinson's various complaints of misconduct were made pursuant to his job duties because he directed them internally within County. Pet. 33. However, the petitioners never made that contention. *See* Ct. App. ER at Vol. II, 37-40. Petitioners never argued that Robinson's speech was made pursuant to his job duties because he directed it to the County. *Id.* Since petitioners never made such an argument, they failed to preserve it for review. More importantly, even if the District Court had rejected the argument – which it did not – the issue does not merit review by this Court.

Next, petitioners argue that circuit courts have inconsistently analyzed various regulations, policies or statutes regarding employee's speech. Petitioners

argue that the two Tenth Circuit cases, *Casey v. West Las Vegas Independent Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007) and *Battle, supra*, conflict with two Seventh Circuit decisions, *Chaklos v. Stevens*, 560 F.3d 705 (7th Cir. 2009) and *Trigillo v. Snyder*, 547 F.3d 826 (7th Cir. 2008). However, petitioners completely fail to address how these purported inconsistencies apply to this case. Petitioners do not even argue that the District Court or Ninth Circuit created a split in authority. Seeking review of an issue not presented in this appeal is tantamount to seeking an advisory opinion. More importantly, the various regulations, policies and statutes at issue in the cited cases are far from identical and really involve a matter of comparing apples to oranges. Each court reviewed the precise language in light of the actual job duties the employee performed. The courts did not utilize "divergent approaches." They simply weighed the evidence and reached different results.

Furthermore, petitioners argue that courts have used different approaches with regard to an employee's "special knowledge" of the information that is disclosed, and presumably, some sort of conflict exists. Again, petitioners completely fail to link this claim to any relevant aspect of this case – petitioners do not contend that the Ninth Circuit's decision is in conflict with other circuits on this point.[2] Petitioners

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[2] Petitioners conceded that virtually all of Robinson's speech occurred while he was off-duty. *See* Ct. App. ER at Vol. IV, 38. Accordingly, petitioners did not make the argument to the

(Continued on following page)

simply argue in the abstract that because some courts placed a greater or lesser emphasis on the employee's specialized knowledge, guidance from this Court is necessary. Moving beyond mere argument, petitioners' cases do not support their claim. In *Williams v. Dallas Independent Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007), the speech was made by an athletic director who revealed fraud in a budget that he was responsible for managing. In *Gorum v. Sessons*, 561 F.3d 179 (3rd Cir. 2009), the speech was made by a tenured professor acting as an advisor and speaking as he was paid to do. Neither of these cases conflict in any meaningful way with the present matter, where the petitioners concede Robinson's speech occurred off-duty and where a factual dispute exists as to Robinson's actual job duties.

Finally, petitioners argue that the appellate decision below is erroneous because it adopts an approach "squarely at odds with *Garcetti*." Pet. 38. Petitioners suggest that the District Court mistakenly assumed that Robinson's speech was not made pursuant to his job duties simply because Robinson was threatened on numerous occasions to not engage in his speech. *Id.* However, petitioners miss the point. The District

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District Court that Robinson's speech was unprotected because it derived from his "special knowledge" as a peace officer. In fact, petitioners' argument has all along been that Robinson's speech is unprotected because County policy required him to make the speech. *See* Ct. App. ER at Vol. IV, 37-40. As such, petitioners have waived this argument on appeal.

Court simply relied, in part, on the threats as conflicting evidence of Robinson's job duties. The District Court properly denied summary judgment because evidence existed that Robinson's job did not require him to report misconduct. The decision in no way conflicts with *Garcetti* or any decisions from any other circuit courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

MARGARET YORK, WILLIAM NASH
and VICTOR TURNER,

Petitioners,

v.

RICHARD ROBINSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

SUMMARY

- There is an express, acknowledged conflict among the circuits on the question of whether under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the determination of whether a public employee's speech was pursuant to job duties is a question of law for the court, or a mixed question of law and fact requiring initial determination by a jury. The Ninth Circuit itself expressly recognized the split among circuits in *Posey v. Lake Pend Oreille School District No. 84*, 546 F.3d 1121, 1127 (9th Cir. 2008) ("[o]ur sister circuits are split over the resolution of this question").

- It is vital that the Court resolve the conflict at this time. Respondent does not, and cannot dispute that First Amendment employment cases are ubiquitous in the federal courts. As noted in the petition, and utterly ignored by respondent, the Ninth Circuit's transformation of an issue of law into a mixed question of law and fact eviscerates qualified immunity as a meaningful defense since, under the Ninth Circuit's view, a plaintiff can create a material issue of fact simply by disputing what duties he or she actually performed. Moreover, even assuming that the Ninth Circuit is somehow correct and the issue of citizen/employee speech is one of fact for the jury, then plaintiffs are being deprived of their rights to a jury trial under the Seventh Amendment on a wholesale basis in five circuits. One way or another,

scores of cases are proceeding with built-in fundamental error.

• It is necessary for this Court to establish that the citizen/employee speech determination is an issue of law for the court in the first instance, in order to further the principles recognized in *Garcetti*, *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). The Court has recognized that core issues of public employee speech, i.e., whether speech addresses a matter of public or private concern, and the ultimate balancing of public interest against First Amendment interest, require the sort of qualitative evaluation that falls within the province of courts, even though that evaluation may be informed by particular facts. As *Garcetti* recognized, while the citizen/employee speech issue inquiry is a "practical one," 547 U.S. at 424, the ultimate question of what speech a public entity can or cannot require of its employees, and hence regulate, is ultimately a question of law for the courts, since a public entity cannot simply define away an employee's First Amendment rights through overly broad job descriptions.

• It is essential that this Court grant review to set down clear guidelines on the factors to be considered in determining whether an employee speaks as a citizen or as an employee. As noted in the petition, and essentially conceded by respondent, district courts and circuit courts are picking and choosing on an ad hoc basis from a number of factors

to determine whether particular speech is or is not part of an employee's official duty. Understanding what factors may or may not subject a public entity to liability is fundamental to the ability of governments to formulate personnel rules, regulations and policies. Public employers must know, for example, whether law enforcement officers like respondent may be required to report incidents of internal misconduct by other officers, even if the particular officer is not specifically charged with the everyday task of investigating misconduct. Similarly, it is important to know whether all employees can be charged with the responsibility to report invidious discrimination, even if their day-to-day work does not involve investigation of such matters. Because uncertainty in this area of the law directly and adversely impacts the basic operations of governments at every level throughout the country, review is warranted.

I. THERE IS AN UNDENIABLE CONFLICT BETWEEN CIRCUITS, RECOGNIZED BY EVEN THE NINTH CIRCUIT, ABOUT THE NATURE OF THE *GARCETTI* INQUIRY – WHETHER IT PRESENTS A QUESTION OF LAW FOR THE COURTS OR A MIXED QUESTION OF LAW AND FACT REQUIRING INITIAL DETERMINATION BY A JURY.

For more than twenty-five years, the question of the protected status of a public employee's speech has been one of law for the court to decide. *Connick*, 461

U.S. at 148 n.7. The Ninth Circuit has changed the rule, purportedly compelled by *Garcetti*. (*See* Petition for Certiorari ("Pet.") 16-18.) It has concluded that the question of the protected status of an employee's speech is no longer one that can be decided at summary judgment as a matter of law; a subpart of the question pertaining to the scope and content of a plaintiff's job responsibilities is one of fact and requires an initial determination by the jury. *Posey*, 546 F.3d at 1123-30. If the employee asserts that the particular speech at issue was not part of his or her job and the employer asserts that it was, the jury resolves the issue, even in the absence of any conflict in the evidence about what was said, or where or when it was said.

Robinson contends that the Ninth Circuit's new rule is not in conflict with other circuits. He simply ignores the fact that the Ninth Circuit itself in *Posey* recognized the split in the circuits, citing some of the very cases Robinson attempts to show are not in conflict. For example, Robinson says of the Fifth Circuit decision in *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008), that the court stated only that the ultimate question of whether speech is entitled to protection is a matter of law, without mentioning any material dispute over the scope and conduct of the plaintiff's job responsibilities and without addressing whether it would have resolved such a dispute, if it existed, at summary judgment. (Opposition ("Opp.") 8.) However, as the *Posey* court pointed out in addressing *Charles*, (546 F.3d at 1127), there *was*

such a dispute at summary judgment, and the magistrate judge had concluded the question whether the plaintiff's statements were made as a citizen or as an employee presented a genuine issue of material fact requiring trial. *Charles*, 522 F.3d at 513 n.17. The Fifth Circuit reversed, concluding that "even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question whether Charles's speech is entitled to protection is a legal conclusion properly decided at summary judgment." *Id.*

At bottom, respondent attempts to skirt the clear and acknowledged conflict among the circuits by characterizing the cited First, Fifth, Tenth and Eleventh Circuit cases as doing nothing more than restating the general proposition that courts may decide an issue as a matter of law based on undisputed facts at the summary judgment stage. (Opp. 8-9.) Yet, as noted in the petition (Pet. 19-21), and as review of the cited cases reveals, the courts find the citizen/employee speech question to be one of law in the context of including it along with the *Pickering/Connick* factors in determining the threshold question of whether employee speech is protected. There is no suggestion in the cited cases that the issue is one of law because the facts are purportedly not in dispute for purposes of summary judgment.[1]

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[1] Respondent cites *Williams v. Riley*, 275 F. App'x 385 (5th Cir. 2008) for the proposition that notwithstanding *Charles v.*

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The lack of clarity in the law has created uncertainty even within the Ninth Circuit. In *Huppert v. City of Pittsburg*, 574 F.3d 696, 698, 701, 703-06 (9th Cir. 2009), the district court dismissed the plaintiffs' First Amendment claims on summary judgment after concluding the statements at issue were unprotected because they were not made by the employees acting as private citizens. The Ninth Circuit affirmed the district court over a dissent. *Id.* at 710. The dissent took issue with the majority's purported failure to follow binding precedent set in the instant case, among others; if the employee states his speech was not part of his official duties, a jury must decide the scope of his or her employment. *Id.* at 718-19, 722 (Fletcher, J., dissenting). The only occasion permitting a court to determine the scope of employment issue as a matter of law, according to the

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Grief, 522 F.3d 508, the Fifth Circuit nonetheless denies summary judgment based upon disputed facts as to whether particular speech fell within an employee's official job duties. (Opp. 8.) As a threshold matter, in *Williams*, the district court had granted a motion to dismiss pursuant to rule 12(b)(6), Federal Rules of Civil Procedure, and in so doing considered extrinsic evidence – official policies – to determine that the plaintiff's speech fell within his official duties. The Fifth Circuit reversed, holding that the consideration of extrinsic evidence effectively transformed the matter into a summary judgment, and remanded for the trial court to allow plaintiffs to "amend" to present additional evidence pertinent to the issue. *Id.* at 388-90. Moreover, to the extent *Williams* is inconsistent with *Charles*'s clear holding that the citizen/employee inquiry is one of law, it simply underscores the confusion in this area and the need for this Court to provide clear guidance.

dissent, is one in which an employee concedes the particular speech at issue was part of explicitly assigned duties. *Id.* at 712, 719 (Huppert conceded he was selected by District Attorney to investigate corruption at public works yard).

In *Huppert*, as in this case, there was no dispute about underlying facts as to what had occurred. *Huppert* illustrates that the undeniable split evident among the circuits over whether the protected status of speech remains an issue of law for a court to decide, exists as well within the Ninth Circuit, underscoring the need for this Court to address and resolve this important issue.

Citing to *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), a product disparagement case, Robinson asserts that the decision below was correct because an issue with a factual component cannot be determined as a matter of law; the inquiry is "a practical one." (Opp. 11.) However, an issue with a factual component is not off-limits to a court. As this Court explained in *Connick*, in light of its obligations under the Constitution,

> [W]e are compelled to examine for ourselves the statements in issue and the circumstances under which they are made to see whether or not they . . . are of a character which the principles of the First Amendment . . . protect. Because of this obligation, we cannot avoid making an independent constitutional judgment on the facts of the

> case. 461 U.S. at 150 n.10 (internal quotations and citations omitted).

Robinson does not explain why the factual analysis of circumstances required to determine scope of employment for First Amendment purposes is any different from that employed by courts to determine whether, for example, particular speech touches on a matter of public concern. (*See* Pet. 22-27.)

Moreover, in the employee speech context, the analysis of "the statements in issue and the circumstances under which they are made" has heretofore occurred at the threshold, to determine if the speech is protected. If it is protected, then the jury determines whether, in fact, protected speech motivated the employer to act against the employee. Robinson does not explain why the citizen-or-employee subpart of the protected status analysis must now be kept from the court until after a jury has made an initial determination, as in *Bose*. And, there is a compelling reason for the *Garcetti* inquiry *not* to be delayed – qualified immunity. (*See* Pet. 27-31.) When the Ninth Circuit imported the *Bose* analysis into the context of public employee speech rights, *see Posey*, 546 F.3d at 1129, it eviscerated the qualified immunity defense. Where, as here, an employee contends it was not part of his job to make a particular statement, the question of whether or not it was must now be put to the jury, thereby precluding qualified immunity, as well as interlocutory review of its denial. (App. 10; *Johnson v. Jones*, 515 U.S. 304, 307, 319-20 (1995.))

Conspicuously, respondent does not address, let alone deny, that application of the Ninth Circuit's erroneous standard for determining citizen/employee speech strips individual defendants of any meaningful ability to raise qualified immunity either at the trial or appellate stage. As discussed in the petition, this undermines the basic purposes of qualified immunity. (Pet. 29.)

II. COURTS AND EMPLOYERS NEED THE GUIDANCE OF THIS COURT ON THE FACTORS TO BE CONSIDERED IN DETERMINING WHETHER PUBLIC EMPLOYEE SPEECH FALLS WITHIN "OFFICIAL DUTIES" UNDER *GARCETTI*.

Petitioners have demonstrated that the framework it was unnecessary to provide in *Garcetti* for determining if a public employee's speech was part of the job is now needed in light of apparent disagreement about what factors are significant to the analysis. (Pet. 31-41.) Robinson denies that any guidance is necessary, even presumably for a jury if indeed this issue is one of fact. He asserts that in the cited decisions the courts "simply weighed the evidence and reached different results." (Opp. 13.) He further contends that the cited cases do not involve application of factors at issue in this case. (Opp. 12-14.)

Respondent's first argument is little more than the assertion that every case is different on its facts. That may be true, but as review of the cited cases

reveals, the problem is that courts are selectively picking and choosing the factors to be applied to the differing facts on essentially an ad hoc basis. This makes it virtually impossible to predict in a given case what "weight" a court, or under respondent's view, a jury may or must give to particular factors.

Moreover, as noted in the petition (Pet. 37-39), in fact the district court here concluded there was an issue of fact concerning whether respondent spoke as an employee based on analysis that has been expressly rejected by the Sixth Circuit. The district court found that since plaintiff was disciplined for his speech, there was necessarily an issue of fact as to whether it was part of his job duties, concluding that an employer would not discipline an employee for doing his or her job. (Pet. 37.) Yet, in *Weisbarth v. Geauga Park District*, 499 F.3d 538, 545 (6th Cir. 2007), the court expressly found that whether an employee was disciplined for particular speech was irrelevant to determining whether or not the speech was made as part of official duties. (Pet. 38-39.)

As noted in the petition, and flatly ignored by respondent, the absence of clear guidelines for determining when particular speech falls within an employee's official duties hamstrings public entities in day-to-day operations. Uncertainty in how courts view the scope of particular regulations, or general employment duties, makes it difficult, indeed impossible, for public entities to enact, implement, and enforce regulations governing employee speech.

Public employers have a clear and substantial interest in requiring employees to report workplace discrimination. However, there is no way to predict whether such reporting requirements will be deemed to be part of an employee's duties for purposes of allowing discipline or other job related consequences based on the employee's failure to report, or improper reporting under such regulations.

Similarly, law enforcement agencies must assure that officers do not commit acts of excessive force or other acts of misconduct. Regulations requiring officers to report such misconduct directly serve the public interest and safety. However, as illustrated by this case, even such specific regulations may not suffice, in the view of some courts, to create a job related duty for purposes of allowing a public employer to enact or enforce such regulations without inviting litigation. Without a clear framework from this Court defining "official" speech under *Garcetti*, public entities and their supervisors may hesitate to enact or enforce regulations that advance core public interests. It is therefore essential that this Court grant review.

CONCLUSION

For the foregoing reasons and those stated in the petition, petitioners urge that the petition for a writ of certiorari be granted.

Respectfully submitted,

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